FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1959

No. 84

SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

vs.

WILLIAM HESTOR.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Filed April 24, 1959.

Probable Jurisdiction Postponed June 22, 1959.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 54

FLEMMING, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

vs.

EPHRAM NESTOR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

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1 (File endorsement omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, Bul. Rusky No. 5, Sofia, Bulgaria, *Plaintiff*,

v.

MARION B. FOLSOM, Secretary of Health, Education and Welfare, Health, Education and Welfare Building, Fourth Street and Independence Avenue, S. W., Washington, D. C., *Defendant*.

Complaint for Statutory Review—Filed May 5, 1958

Plaintiff, Ephram Nestor, by his attorneys, complaining of the defendant, alleges as follows:

1. The Court has jurisdiction of this action under 42 U. S. Code, sec. 405(g).

2. The defendant is the Secretary of Health, Education and Welfare. In that capacity he is responsible for the administration of the federal program of old age insurance.

3. The plaintiff presently resides in Bulgaria and until July 1956, resided and worked in the United States.

4. The plaintiff is entitled to insurance benefits pursuant to the provisions of Title II of the Social Security Act. On March 12, 1956, the Department of Health, Education and Welfare issued to the plaintiff a certificate of Social Insurance Award, certifying that he was entitled to such benefits in the amount of $55.60 a month.

5. In July 1956, the plaintiff was deported from the United States. The order of deportation was based upon the provisions of 8 U. S. Code, 1251(a)(6), on the ground of past membership in the Communist Party
2 of the United States.

6. Thereafter, the defendant, acting through his subordinates, and pursuant to the provisions of section 202(n) of the Social Security Act, 42 U. S. Code, sec. 402(n), suspended payment of plaintiff's old-age insurance benefits from and after September, 1956.

7. The alleged conduct of the plaintiff which was the basis for the order of deportation antedated the enactment both of the statute authorizing his deportation and of sec. 202(n) of the Social Security Act.

8. The plaintiff appealed the action of the Secretary suspending his benefits, and on March 13, 1958, final administrative action was taken rejecting his appeal. The plaintiff has exhausted his administrative remedies.

9. The action of the defendant suspending the benefit payments to the plaintiff was illegal and unconstitutional, being, among other things, in violation of Article I, section 9, Article III, section 2, and the First, Fifth and Sixth Amendments of the Constitution.

WHEREFORE, plaintiff prays that the Court adjudge that the suspension of said benefit payments is illegal and unconstitutional and order the defendant to withdraw his order suspending the payment of benefits to the plaintiff, to pay plaintiff accrued benefits as may be due him, plus interest, and all Social Security benefits that may accrue to him in the future, and grant such other and further relief as may be just and proper under the circumstances.

DAVID REIN
David Rein

JOSEPH FORER
Joseph Forer

FORER & REIN
711 14th Street, N. W.
Washington, D. C.

Attorneys for Plaintiff.

(File endorsement omitted in printing)

3 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1154-58

(Title omitted)

Answer—Filed July 3, 1958

COMES Now the defendant, United States of America, by and through its attorneys Oran H. Waterman, James C. Hise and James L. Weldon Jr., Department of Justice, Washington, D.C., and answers the plaintiff's complaint for statutory review as follows:

1. Defendant asserts that inasmuch as the allegations contained in the first paragraph of the complaint state conclusions of law, he is not required to plead responsively thereto, but were he required to reply he would deny the conclusions alleged therein.

2. Defendant admits the allegations contained in paragraph two.

3. Defendant admits that plaintiff presently resides in Bulgaria and avers that he immigrated to the United States in 1913 and lived and worked here until July, 1956 at which time he was deported.

4. Defendant denies the allegations contained in the fourth paragraph of the complaint, except that defendant admits that on March 12, 1956, the Department of Health, Education and Welfare issued to the plaintiff a certificate of Social Insurance Award, certifying that he was entitled to such benefits in the amount of $55.60 a month.

4 5. Defendant admits the allegations contained in paragraph five of the complaint.

6. Defendant admits the allegations contained in paragraph six of the complaint.

7. As to paragraph seven of the complaint, the defendant admits that the proved conduct of record of the plaintiff, which was the basis for his deportation, antedated the

enactment both of the statute authorizing his deportation and of section 202 (n) of the Social Security Act. Defendant further avers that the statute authorizing the plaintiff's deportation and section 202 (n) of the Social Security Act antedated the date of deportation of the plaintiff.

8. Defendant admits the allegations contained in paragraph eight of the complaint.

9. Defendant asserts that inasmuch as the allegations contained in the ninth paragraph of the complaint state conclusions of law, he is not required to plead responsively thereto, but were he required to plead he would deny the conclusions alleged therein.

FOR A FURTHER ANSWER AND BY WAY OF AN AFFIRMATIVE DEFENSE the defendant alleges:

I

The complaint fails to state a claim upon which relief can be granted.

II

The Court has no jurisdiction in this case, except such jurisdiction as is prescribed by section 205 (g) of the Social Security Act as amended, 42 U. S. C. A. section 405 (g), which provides for judicial "review" of the "final decision" upon the administrative record, a certified copy of which is filed as part of this answer pursuant to said section 205 (g) of said Act as Exhibit 1, and which declares the defendant's findings as to any fact to be conclusive if supported by substantial evidence, and which impowers the Court, in an action duly brought thereunder, to enter only such judgment as is specifically provided for in said section of said Act.

5 III

The findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive.

WHEREFORE, defendant prays for judgment dismissing the plaintiff's complaint with costs and disbursements, and for judgment in accordance with section 205 (g) of the

Social Security Act, as amended, 42 U. S. C. A. 405 (g), affirming the decision complained of.

ORAN H. WATERMAN
Oran H. Waterman

JAMES C. HISE
James C. Hise

JAMES LEE WELDON, JR.
James L. Weldon, Jr.

---

6 (Certificate of service omitted in printing)

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7 **Exhibit to Answer—Excerpts from Administrative Proceedings before the Department of Health, Education and Welfare—Social Security Administration**

(Certification of following transcript omitted in printing)

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8 **Letter Transmitting Denial of Request for Review**

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
WASHINGTON, D. C.

Office of Appeals Council

March 13, 1958

In the case of Ephram Nestor, Claimant and Wage Earner
Social Security Account No. 569-12-6491

Mr. Ephram Nestor
Bul. Rusky No. 5
Sofia, Bulgaria

Dear Mr. Nestor:

There is enclosed herewith a copy of the Appeals Council's denial of your request for review of the referee's decision on your claim for old-age insurance benefits under the Social Security Act. Your request for review having

been denied, the referee's decision stands as the final administrative decision on your claim.

Sincerely yours,

JOSEPH E. MCELVAIN
Joseph E. McElvain
Chairman

Enclosure

9

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF APPEALS COUNCIL

Denial of Request for Review—January 31, 1958

In the case of
Ephram Nestor, claimant
Ephram Nestor, Wage Earner
Social Sec. Acc't. No. 569-12-6491

Case No. LA-1156
Claim for old-age Insurance Benefits
Decision of Referee William W. Kapell
Dated January 31, 1958

This case is before the Appeals Council upon request of the claimant for review of the referee's decision rendered in the captioned case. After careful examination of this matter, we are of the opinion that a formal review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS COUNCIL
JOSEPH E. MCELVAIN
Joseph E. McElvain, *Chairman*

Dated: March 13, 1958

12

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF APPEALS COUNCIL

Referee's Decision—January 31, 1958

In the case of
Ephram Nestor
Ephram Nestor
569-12-6491

Case No. LA-1156
Claim for Old-Age Insurance Benefits

This case is before the referee pursuant to the request for hearing filed on November 21, 1956, on behalf of Ephram Nestor, the claimant, because of his dissatisfaction with the determination of the Bureau of Old-Age and Survivors Insurance of the Department of Health, Education and Welfare, issued on October 25, 1956, that his old-age insurance benefits be suspended beginning with the month of September 1956. A hearing, at which claimant's representatives, Barbara B. Nestor, his wife, and Irwin Gostin, his attorney, appearing by Seymour Mandel, co-counsel, appeared and participated in, was held in Glendale, California on December 30, 1957.

Claimant became entitled to old-age insurance benefits in November 1955. The Bureau suspended payment of his benefits in October 1956 because it found that claimant had been deported in July 1957, pursuant to paragraph (1) of section 241(a) of the Immigration and Nationality Act and held that under section 202(n) of the Social Security Act, as amended, payment of his old-age insurance benefits should be suspended effective September 1956.

At the hearing, it was contended on behalf of claimant that he had a vested right to old-age insurance benefits prior to the enactment of the amendment to the Social Security Act, which suspended payment of his benefits, and that, therefore, the amendment deprived him of due process of law. In a Memorandum of Points and Authorities submitted subsequent to the hearing, claimant con-

tends further that the Social Security Act was amended on August 1, 1956, to suspend payment of benefits to individuals deported after September 1, 1956, and that, therefore, the amendment does not apply to claimant because he was deported *before* that date. The general issue to be determined is whether claimant's old-age insurance benefits were properly suspended following his deportation.

13 The pertinent part of section 202(n) of the Social Security Act, provides:

> (1) If any individual is (after the date of enactment of this subsection) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—
>
> (A) no monthly benefit under this section . . . . shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.
>
> (2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241(a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

The facts are not in dispute. The record shows that claimant filed an application for old-age insurance benefits on December 2, 1955, and received an award of $55.60 per month effective November 1955. On August 31, 1956, the Bureau received notice from the Attorney General of the United States that claimant was ordered deported to Bulgaria on July 7, 1956, pursuant to paragraph (1) of section 241(a) of the Immigration and Nationality Act.

The Bureau, thereupon, in conformance with section 202(n) of the Social Security Act, as amended, suspended payment of claimant's old-age insurance benefits effective September 1956. Inadvertently, however, the Bureau paid benefits to claimant for the month of September 1956. Notice of the suspension of payment of old-age insurance benefits to claimant was given to Barbara B. Nestor, his wife, on November 15, 1956. Claimant, thereafter, on February 26, 1957, appointed Barbara B. Nestor, his wife, and Irwin Gostin, his attorney, as his representatives to represent him in connection with his claim that payment of his old-age insurance benefits should be resumed.

14 The contention made by claimant that the amendment to the Act, suspending payment of old-age insurance benefits to individuals deported pursuant to the applicable provisions of the Immigration and Nationality Act, is unconstitutional because it deprives him of a vested interest can not be raised in the instant proceeding. It is well settled that an administrative body has no authority to pass upon the constitutionality of the Act which it is called upon to administer. *Engineers* v. *S.E.C.*, 138 F. 2d 936, 952, cert. granted 322 U. S. 723, petition dismissed, 332 U.S. 788; *MacLeod* v. *Fernandez*, 101 F. 2d 934, cert. denied 101 U.S. 561. Nor is there any merit to his contention that claimant acquired a vested right to benefits which rendered the payment thereof immune from the further exercise of the right of Congress to alter, amend, or repeal any provision of the Social Security Act. Payments made as the result of Congressional appropriation have not been thus far construed as contractual in their nature giving use to a vested right. *Norman* v. *B. & O. Ry.*, 294 U. S. 240. Furthermore, the Act provides (Title 42 U.S.C, § 1304): "The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress." See *Mullawney* v. *Folsom*, C.C.H. Fed. Par. 8332, (E.D. N.Y. October 30, 1957).

The case of *Ewing* v. *Gardner*, 185 F. 2d 781, cited by claimant in support of his contention that his claim to benefits became a vested right, is inapposite. In that case plaintiff was held entitled to benefits which had accrued

during a past period when he had satisfied all the statutory requirements for entitlement. In the instant case claimant no longer satisfied all the statutory requirements after his deportation and, accordingly, was not entitled to benefits accruing thereafter. His only vested right was in the benefits accruing prior to his deportation and for which he has been paid.

Claimant is in error when he assumes that section 202(n) of the Social Security Act became effective August 1, 1956, and was applicable only to individuals deported thereafter. The pertinent provisions of that section suspending benefit payments to individuals who are deported, became effective on September 1, 1954, and was made applicable to individuals deported thereafter. Accordingly, there is no merit to claimant's contention that the pertinent provisions of the section are not applicable to him.

It is, therefore, the decision of the referee that the Bureau properly suspended the payment of benefits to claimant, effective September 1956.

William W. Kapell
WILLIAM W. KAPELL, *Referee*

Dated: Jan. 31, 1958

22 DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
Social Security Administration
Office of Appeals Council

TRANSCRIPT

Case No. LA-1156

In the case of Ephram Nestor (Claimant)

Claim for Old-Age Insurance Benefits

Social Security Account No. 569-12-6491

Hearing Before Referee Held in Glendale, California on December 30, 1957

APPEARANCES:

BARBARA BESS NESTOR, Wife of Claimant
SEYMOUR MANDEL, Attorney

REFEREE: WILLIAM W. KAPELL

Reporter: J. W. Lucy

---

24 **Opening Statement of Referee:**

The hearing will come to order. This is a hearing in Case Number LA-1156, involving the claim of Ephram Nestor; Social Security Account Number 569-12-6491. This hearing is being held at the request of the claimant because of his dissatisfaction with the determination of the Bureau of Old-Age and Survivors Insurance that his old-age insurance benefits be suspended effective September 1956.

* * * * * * * * * * *

My first knowledge of this case came after a request for hearing was filed, and the Bureau of Old-Age and Survivors Insurance sent me the file in the case. The file contains various documents which have been collected by the Bureau up to the present time and the decision of
25 the Bureau. I went through the file and marked, for identification, those documents which I thought relevant to this case and prepared a list of them. They are as follows: Exhibit Number 1 is an Application for Old-Age Insurance Benefits by Ephram Nestor, dated December 2, 1955; Exhibit Number 2 is an Application for Wife's Insurance Benefits by Barbara B. Nestor, dated December 5, 1955; Exhibit Number 3 is the Earnings

Certification, Primary Insurance Amount Determination, which is dated December 8, 1955; Exhibit Number 4 is a Notice of Deportation dated July 7, 1956; Exhibit Number 5 is a Report of Contact by A. V. Gillesby, Field Representative of the Bureau, dated October 1, 1956; Exhibit Number 6 is a letter from Irwin Gostin, attorney, to the San Francisco Area Office of the Bureau, dated November 21, 1956, requesting a hearing before a referee; Exhibit Number 7 is a Determination of Award of benefits, dated March 7, 1956; Exhibit Number 8 is a Certification of Termination of Entitlement or Suspension of Payments by the Bureau dated October 25, 1956; Exhibit Number 9 is an Appointment of Representative dated February 25, 1957; Exhibit Number 10 is a copy of a letter from the Inglewood, California District Office to Mrs. Barbara Bess Nestor notifying her of suspension of her husband's benefits.

• • • • • • • • • • •

26 Referee: There being no objection, the documents identified in the List of Exhibits will be received into evidence as Exhibits Nos. 1 to 10, inclusive. An examination of these documents shows what has happened in this case up to this time. I will summarize them and state the issue to be decided. If the summary and the issue are not as claimant's representatives understand them to be, they will have an opportunity to suggest any changes as soon as I have finished stating them.

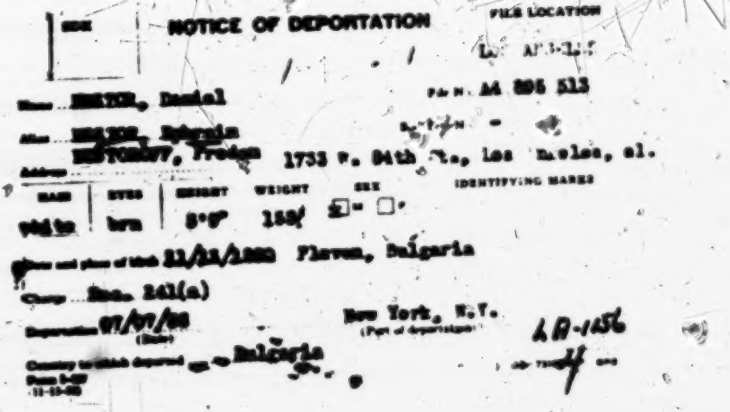
The record shows that claimant, Ephram Nestor, filed an Application for Old-Age Insurance Benefits on December 2, 1955. Effective November 1955 he became entitled to old-age insurance benefits in the amount of $55.60 per month. At the same time his wife, Barbara B. Nestor, also became entitled to wife's old-age insurance benefits in the sum of $27.80 per month. She, thereafter, was notified on October 25, 1956, by the Bureau, that benefit payments to her husband had been suspended beginning with the month of September 1956,

27 because he had been deported to Bulgaria pursuant to Section 241(a) of the Immigration and Naturalization Act, • • •

• • • • • • • • • • •

[48]

Exhibit 4



NOTICE OF DEPORTATION

FILE LOCATION

Name: [redacted], Daniel

File No. A4 895 513

Also known as: [redacted], Bulgrain

Address: [redacted], Predrag 1733 W. 84th Pl., Los Angeles, Cal.

RACE	SEX	HEIGHT	WEIGHT	SEX	IDENTIFYING MARKS
White	Male	5'9"	150#	☒ ☐	

Place and date of birth: 11/13/1920 Pleven, Bulgaria

Charge: Sec. 241(a)

Deportation to: (Date) 07/07/58 New York, N.Y. (Port of departure) LA-1456

Country to which deported: Bulgaria

Form I-257
11-15-56

[49] **Exhibit 5**

REPORT OF CONTACT

Los Angeles 12, Calif.
10-1-56
569-12-6491

Subject Name

U. S. Dept. of Immigration & Naturalization
458 S. Spring St. Los Angeles 12, Calif.

☐ ☒

Mr. Sutton, Chief of Deportation Sec. & Court Division in the year, and that life was deported under paragraph (11) of Section 241 (a).

[redacted]

Agent Signature

Agent Signature

10-1156

Exhibit 5

[51] Exhibit 7

DETERMINATION OF AWARD

919-12-4871

11/13/57 12/2/57

12/31/56 1/1/57

10,976.95 195 10 55.60

B		9/29/56	12/ /57	27.80

Inglewood 1, Calif.

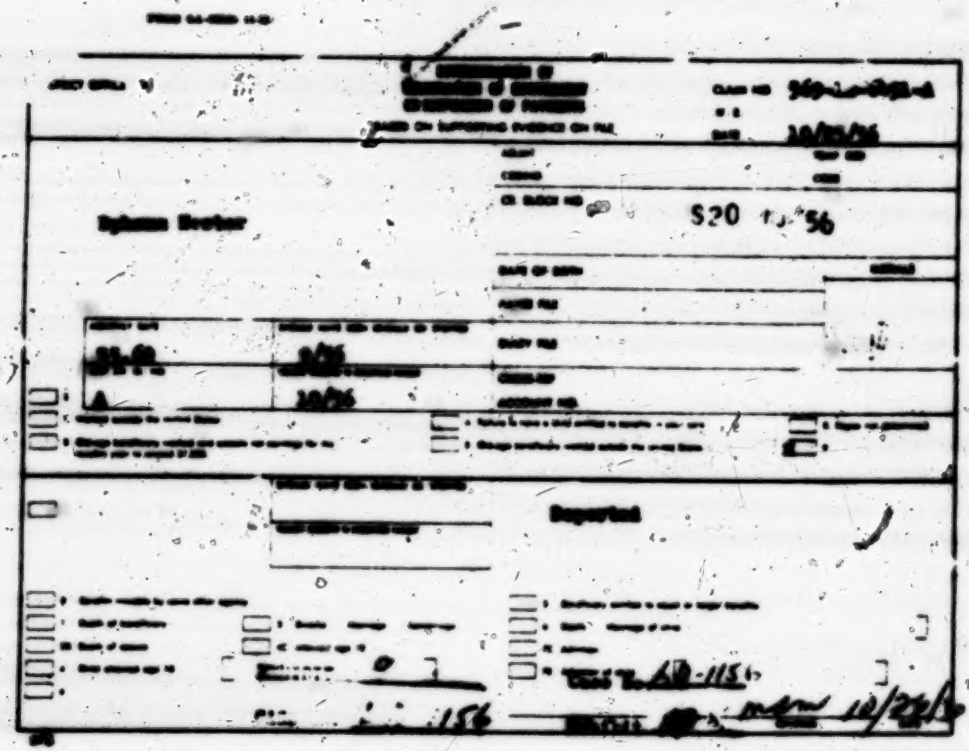
$ yrs. Accepted

R= 7578

A	Ephrem Tarter	11/57	27.80
	3733 W. 62nd St.		
	Los Angeles 43, Calif.		
B	Barbara J. Tarter	11/57	27.80
	Same		

1C 12/2/57

[52] Exhibit 8



55 **Exhibit 10**

353 E. Queen St.

November 15, 1956

Mrs. Barbara Bess Nestor
1733 W. 84th Street
Los Angeles, California

Dear Mrs. Nestor:

This is in reply to your recent letter inquiring as to the non-receipt of your husband's check for October 1956.

The Social Security Law, as amended, provides that where persons receiving benefits have been deported after September 1, 1956, under certain provisions of the Immigration and Naturalization Act, social security payments may no longer be made to these persons. Information received from the Immigration and Naturalization Service indicates that your husband, Ephram Nestor, has been deported under the provisions of the law referred to above.

In view of your husband's deportation, there are no additional payments due under the social security law. In fact, it appears that he actually has been overpaid for the month of September 1956.

If you have any further questions, please feel free to call us.

Sincerely yours,

GEORGE R. KRETS,
District Manager

By .....
KENNETH E. KURTS
Claims Representative

KEK/w

(File endorsement omitted in printing)

56 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted)

Order Substituting Defendant—September 5, 1958

On motion of the plaintiff, consented to by the parties and by Arthur S. Flemming, Secretary of the Department of Health, Education and Welfare, and it appearing that Marion B. Folsom, the named defendant herein resigned as Secretary of Health, Education and Welfare during the pendency of this suit, that on August 1, 1958 Arthur S. Flemming was sworn in as his successor, that the new Secretary of Health, Education and Welfare is keeping in effect the determination, ruling or order of the Department of Health, Education and Welfare complained of in the complaint, and, unless otherwise ordered by the court, will continue to do so, and that accordingly there is a substantial need for continuing and maintaining this action, it is by the court this 5th day of September, 1958,

ORDERED that Arthur S. Flemming, Secretary of Health, Education and Welfare be, and he hereby is, substituted as defendant in place of Marion B. Folsom, and that the caption of the case be, and it hereby is, amended accordingly.

F. DICKINSON LETTS
Judge

Consented to:
DAVID REIN
David Rein
Attorney for Plaintiff

JAMES LEE WELDON, JR.
James Lee Weldon, Jr., Department of Justice
Attorney for Defendant, and for
Arthur S. Flemming,
Secretary of the Department of Health,
Education and Welfare.

(File endorsement omitted in printing)

57 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted)

**Plaintiff's Motion for Summary Judgment—
Filed October 24, 1958**

Now comes the plaintiff by his attorneys, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff relies upon the pleadings herein, and on the attached certified copy of the decision of the Board of Immigration Appeals.

DAVID REIN
David Rein

JOSEPH FORER
Joseph Forer
Attorneys for Plaintiff.

CERTIFICATE OF SERVICE (Omitted in printing)

57A

Exhibit to Plaintiff's Motion for Summary Judgment—Decision of Board of Immigration Appeals

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

November 9, 1954

File: E-069450—Los Angeles

In re: DANIEL NESTOR or EPHRAM or PRODAN NESTOROFF

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Irwin Gostin, Esquire
6305 Yucca Street
Los Angeles, California

CHARGES:

Warrant: Act of 1952—After entry, an alien who was a member of the Communist Party of the United States

Lodged: None

APPLICATION: Termination of proceedings

DETENTION STATUS: Released on bond

Appeal from order of the special inquiry officer requiring respondent's deportation on the ground stated above.

Appeal is taken on the basis of the unconstitutionality of the statute in question and on the ground that the decision is not based upon reasonable, substantial and probative evidence. Respondent is a 63-year-old married male, native and citizen of Bulgaria, who last entered the United States in 1913. The special inquiry officer found that the record established that respondent had been a voluntary member of the Communist Party from about 1933 to 1939. On advise of counsel, respondent refused to be sworn or to testify.

The evidence of record has been outlined in complete detail by the special inquiry officer. Briefly, membership in the Communist Party is established by testimony of three Government witnessess, Rosser, Kimple and Leech. There has also been introduced into evidence a Communist

Party membership booklet which Kimple identified as belonging to the respondent. Rosser and Leech have placed him at closed meetings of the Communist Party.

In view of the respondent's silence, we find it unnecessary to go into great detail in setting forth our findings concerning counsel's contentions. We have carefully considered these contentions. We believe the following comments are sufficient. Rosser testified he attended two
57B closed meetings of the Communist Party with respondent. His testimony is attacked on the ground that he testified that he saw the respondent at meetings attended by Communists residing in the 61st and 63rd Assembly District, whereas proof was introduced to show that the respondent was not a resident of either district. This contention ignores Rosser's explanation that the closed Communist Party meetings in question, although commonly referred to as being meetings of the 61st and 63rd Assembly District, was attended by Communist Party members of the adjacent 66th Assembly District because there were not too many members in the 66th district (p. 122). We have carefully examined all other contentions concerning Rosser and Leech. We find that the contentions which should be given any weight at all relate to collateral matters and do not subtract substantially from the credibility of the witnesses in the instant proceeding.

Kimple testified that he met respondent in 1937; that he handled the 1938 and 1939 Communist Party registration of the respondent; and that he had handled the respondent's official Communist Party membership book for the year 1938. Kimple testified that he recalled the respondent despite infrequent association with him because of the fact that respondent was the stepfather of Dorothy Ray Healey, a Communist whom Kimple knew well. Kimple stated he knew her as Dorothy Ray Healey between 1936 and 1938, and as Dorothy Connelly about 1938 and 1940. However, the record establishes that Dorothy Ray did not marry Healey until 1941 and did not marry Connelly until 1946. The "discrediting" evidence does not have the weight it might otherwise have had there been competent evidence establishing that Dorothy Ray was not in fact known as Healey or Connelly during the period testified to by respondent; for we note Leech's testimony that "relation-

ships within the Communist Party were very loose and were assumed relationships'' (p. 207). The record bears this out. For example, the testimony reveals that respondent's wife was known as Mrs. Nestor about 1933 and about 1935, although she apparently did not marry respondent until 1936 (pp. 176,207). Nevertheless we have taken the documents relating to Dorothy Ray into consideration in evaluating Kimple's testimony. It is conceded that Dorothy Ray was known by the name witness knew her by and that she is the stepdaughter of the respondent. This one instance of inability to recall the times at which Dorothy Ray assumed the various names (if it is established on this record) when compared with the other evidence of record revealing the strong recollection of the witness diminishes the importance of this incident which moreover concerns a collateral matter.

In attacking Kimple's testimony, counsel has made the point that Kimple, who testified in over 30 previous proceedings, ''could not recall the name of the respondent in 20 of them.'' This is not in accord with the record which clearly reveals that Kimple testified that he believed that he could recall about 20 names and if given the time ''could do a little better than 20'' (p. 65).

57C The combined testimony of the three witnesses and the documentary evidence introduced constitute reasonable, substantial and probative evidence of Communist Party membership. This conclusion was reached without considering the effect of respondent's silence. The respondent's silence is further corroboration of the correctness of the Service contention.

Constitutional objections are not within the jurisdiction of this Board for consideration. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

(Sig) Illegible
Acting Chairman

(File endorsement omitted in printing)

58 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

(Title Omitted)

Defendant's Cross-Motion for Summary Judgment—Filed November 6, 1958

Now comes the defendant, Arthur S. Fleming by his attorneys, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon the pleadings herein, respectfully moves this Honorable Court to enter summary judgment for defendant on the ground that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law.

ORAN H. WATERMAN
Oran H. Waterman

JAMES LEE WELDON, JR.
James Lee Weldon Jr.

JAMES C. HISE
James C. Hise

Attorneys, Department of Justice
Washington 25, D. C.

Attorneys for Defendant

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59 CERTIFICATE OF SERVICE (omitted)

(File endorsement omitted in printing)

60 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, *Plaintiff*

v.

MARION B. FOLSOM, Secretary of Health, Education and Welfare, *Defendant*

Memorandum Opinion—January 13, 1959

FACTS

The plaintiff in this case immigrated to the United States in 1913 from Bulgaria. He was employed in the United States in employment covered by the Social Security Act from December of 1936 until January, 1955. In December of 1955, he filed an application for old age benefits, and he received an award of $55.60 per month effective as of November, 1955.

On July 7, 1956, the plaintiff was deported to Bulgaria pursuant to paragraph (1) of Section 241(a) of the Immigration and Nationality Act. On August 31, 1956, the Attorney General of the United States notified the Bureau of Old Age and Survivors Insurance of the Department of Health, Education and Welfare of the fact that the plaintiff had been deported. The Bureau, pursuant to Section 202(n) of the Social Security Act (Title 42, U.S.C. Sec. 402(n)),[1] suspended payment of plaintiff's old age insurance benefits from and after September, 1956. However, it was through inadvertence that the Bureau did pay benefits to the plaintiff for the month of September, 1956.

The plaintiff's wife, Barbara B. Nestor, was given notice of the suspension of payment of old age insurance
61 benefits in November of 1956. In February of 1957, the plaintiff appointed his wife and Irwin Gostin, an attorney, to represent him in his attempts to have the benefit payments reinstated and paid to him in Sofia, Bulgaria.

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1 See Appendix, *Note 1.*

On January 31, 1958, a decision of a referee of the Department of Health, Education and Welfare was rendered subsequent to a hearing which was held on December 30, 1957, said decision holding that the Bureau properly suspended the payment of benefits to the plaintiff in this case. Following this, on May 5, 1958, plaintiff filed a complaint in this Court for statutory review.

The case is now before this Court on cross-motions for summary judgment, oral argument having been afforded both parties on November 24, 1958.

CONTENTIONS OF PLAINTIFF

The sole issue in this case, according to the plaintiff, is the constitutionality of Section 202(n) of the Social Security Act. He contends that this section of the Act, as applied to him, is unconstitutional. In support of this conclusion, his argument sets forth the following contentions:

1. *Plaintiff is entitled as a matter of right to Social Security Benefits.*

The plaintiff argues that "throughout the history of the Social Security Act, old age insurance benefits have been referred to as a right of the recipient which he has earned and paid for." He also places reliance upon the 1949 Report of House Ways and Means Committee, President Eisenhower's message of January 14, 1954 (100 Cong. Rec., 83rd Cong., 2nd Session, p. 257), remarks of Senator Millikin (100 Cong. Rec., p. 14382) and also upon the remarks of Senator George (102 Cong. Rec., p. 15110),
62 all of which, in effect, state that Social Security benefits are not charity or "a hand-out", but rather are paid to the recipient as an earned right and are related in part to the individual's earnings.

2. *Deprivation of Old Age Insurance Benefits is the imposition of a penalty.*

The plaintiff reasons that benefit payments are derived from contributions of covered workers, their employers and self-employed persons. The payments that he claims under the Act were, in fact, earned through his work and

are assured as a matter of statutory right. However, Congress has adopted an amendment to the Social Security Act which may deprive a person of old age insurance benefits upon conviction of certain crimes and may actually constitute a part of the sentence imposed upon such persion (Title 42 U.S.C., Sec. 402 (u)).[2] Therefore, the plaintiff argues that the withholding of his benefits constitutes a penalty.

In reference to this amendment, the plaintiff's conclusion that such deprivation is a penalty is also based upon letters from the Secretary of Health, Education and Welfare to the Senate Finance Committee on March 28, 1956 (Hearings before the Committee on Finance of U. S. Senate 84th Cong., 2nd Session (pp. 1318-1319))[3] and from the Director of the Bureau of the Budget to the Chairman of the Finance Committee (p. 1342).[4]

Plaintiff also contends that even if the benefits are a gratuity and not a right, he is still entitled to them and that a deprivation is an imposition of a penalty exercised in noncomformity to constitutional standards.

63 3. *Deprivation of Old Age Benefits in this case violated the Constitution.*

The basis for denying to the plaintiff his old age benefits was his deportation which, in turn, was based upon his past membership in the Communist Party. He concedes that deportation based on this activity has withstood constitutional challenge but alleges that the deportation was carried out "solely on the basis that a deportation is not penal in character and is accordingly not subject to the provisions of the ex post facto and bill of attainder clauses of the Constitution, and for the same reason need not conform with the constitutional requirements governing the imposition of a penalty." Consequently, he alleges that the same statute and procedure cannot serve as the basis for the imposition of a penalty. He further alleges that Congress recognized this in 1956 when, by the amendment to the Social Security Act, the imposing of such a

[2] See Appendix, *Note 2.*

[3] See Appendix, *Note 3.*

[4] See Appendix, *Note 4.*

penalty (i.e., deprivation of old age insurance benefits) was provided for upon conviction of certain crimes upon the principle that the deprivation was part of the judicial process and was imposed only after a judicial trial.

Plaintiff contends that Sec. 202(n) of the Social Security Act is invalid as an ex post facto law and as a bill of attainder. He further contends that the statute is against the due process clause of the Fifth Amendment to the Constitution because deprivation of the benefits has no relation to the aims of the Social Security Act and that since the Act, itself, does not require moral character as a condition to eligibility, there is no reason to discriminate against the group of which the plaintiff is a member.

64 Finally, the plaintiff states that the suspension of benefits was based upon his deportation and this, in turn, was based upon his participation in certain activities which he alleges were protected by the First Amendment. In other words, the real basis for his deportation and subsequent suspension of social security benefits was because of activities in which he could legally participate.

Contentions of Defendant

In his opposition to the plaintiff's motion for summary judgment and in support of his cross motion for summary judgment, the defendant alleges that the plaintiff did not have a vested right to receive social security benefits; that suspension of benefits under 202(n) of the Social Security Act is not the imposition of criminal punishment; that the aforesaid section of the Act is constitutional as applied to the plaintiff; and that the findings of fact by the Secretary are supported by substantial evidence and are conclusive.

Purpose of the Act

Counsel for the defendant has emphasized the importance of considering the purpose of the Social Security Act. Although counsel for the plaintiff puts little, if any, emphasis on this, it would be well to briefly inquire into the purpose of this legislation.

The Social Security Act of 1935 "provided a system of old-age insurance for persons working in industry and commerce as a long-run safeguard against the occurrence of old-age dependency." (U.S. Code, Cong. Svc., Vol. 2,

81st Cong., 2nd Sess., 1950, p. 3289). Subsequent revisions and amendments through 1946 dealt generally with provisions for broader coverage supplementary benefits for dependents of the primary beneficiary and determining contribution rates.

Congress, under authority granted to it by the Federal Constitution (Article I, Sec. 8), saw fit to enact this legislation for the general welfare. Mr. Justice Cordozo, in the case of *Helvering* v. *Davis*, (57 S. Ct. 904; 109 A.L.R. 1319, 1324), wrote the following in discussing the Social Security Act:

> "But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near."

See also: *Ewing* v. *Black*, 172 F.2d 331, 335; *Ray* v. *Social Security Board*, 73 F. Supp. 58, 62.

Insofar as the purpose of the Act may be relevant, it arises in this manner, according to the Government:

> "A condition for the payment of benefits which takes into consideration whether or not the claimant is within or outside the United States is clearly reasonably related to the purpose of the program. The function which Title II of the Social Security Act was designed to serve was to minimize the great and rapidly growing cost of providing for needy aged persons in the United States * * * Certainly it would be pertinent to this purpose to consider, in establishing conditions prequisite to eligibility for benefits, the physical presence or absence of a potential claimant within the United States. A fortiori, it is pertinent and reasonable to condition the payment of benefits so as to exclude payment to an individual who has been deported therefrom." (Points and Authorities of defendant's motion p. 6)

With reference to this contention of the defendant, note must be taken of the following from Vol. 100, Cong.
66 Rec., 83rd Cong. 2nd Session, Jan. 25, 1954, p. 736, wherein Congresswoman Mrs. St. George quotes from a letter received by her from the Secretary of Health, Education and Welfare: "As you know, neither United States Citizenship or residence in the United States are requirements for receipt of old-age survivors insurance benefits.

"In 1939, a provision which would have prevented the payment of benefits to otherwise eligible persons who live abroad was considered by the Congress but was not included in the law."

The foregoing statement was relative to a short remark of Mrs. St. George dealing with people who work in the United States and become eligible for old-age pensions and then return to their country of origin. She commented that in some countries it was possible for a foreign national residing in one of these countries to collect old-age pensions from the United States as well as from his own country. She deemed it necessary that legislation to prevent "a rather obvious abuse of the intention of the law should be considered." Congress, in 1956, added subsection (t) to Sec. 402, Title 42, entitled, "Suspension of benefits of aliens who are outside the United States."

The plaintiff, however, contends that the purpose of the Act is immaterial as applied to him. He says that the right of a worker to social security benefits is an earned right and a deprivation of the benefits is a deprivation of property to which he is entitled, and to deprive him of such benefits is in the nature of an imposition of a penalty and as such must conform with constitutional requirements. In other words, when a person meets the requirements of the Act so as to be eligible for benefits, at that time he comes into possession of an accrued right, or a prop-
67 erty right, and as such, these benefits may then be taken away only in conformance with constitutional requirements.

Nature of the Benefits and Power of Congress

At this point it becomes necessary to determine as far as possible the nature of the benefits conferred under the Social Security Act. Briefly, the fund from which such

payments are made was created pursuant to Title 42, U.S.C. 401.[5] The fund itself is made up of taxes which are paid by employees and employers, these taxes being compulsory for the most part. As a practical matter, the monies which supply this fund rarely come under the control of the person from whose wages they are deducted.

In order to be eligible for reception of these benefits, the Act sets forth three conditions precedent. (See Sec. 402(a))[6] Accordingly, once these conditions are fufilled, the applicant then becomes entitled to benefits. The plaintiff in the present case fulfilled the statutory requirements in December of 1955 and he was awarded monthly benefits effective in November of 1955.

The defendant asserts that the right to benefits conferred pursuant to the statute is a creative right—that is, a statutory conditional right—which the Congress of the United States has the power to alter or terminate. In support of his position, the defendant cites the case of *Ewing* v. *Risher*, 176 F. 2d 641, 10th Cir. (1949) and *Norman* v. *B & O RR Co.*, 294 U.S. 240, 308. The *Ewing* case involved a situation whereby a widow's claim for a lump-sum payment of death benefits was denied on the ground that the claim was not filed within two years
68 of the date of her husband's death, and her claim for widow's insurance benefits was allowed for a shorter time than she claimed because of her failure to file a timely application therefor. The Court at page 644, wrote:

> "* * * The rule is well settled that where a statute creates a right, such as the one in this case, unknown to the common law and limits the time within which the right must be asserted, the limitation defines and controls the right and the right ceases to exist if not asserted within the time fixed in the statute therefor."

Although the above-cited case lends support to the contention of the defendant as to the nature of the benefits conferred, it is readily distinguishable in certain aspects from the present case. The cited case dealt exclusively with the fulfillment of certain conditions precedent as pre-

[5] See Appendix, *Note 5.*

[6] See Appendix, *Note 6.*

scribed by statute, whereas in the present case these conditions precedent were fulfilled, and it is the termination of benefits that is being contested.

In the case of *Ewing* v. *Gardner*, 185 F. 2d 781, the appellee, executor of the estate of the decedent brought an action for primary insurance benefits under the Social Security Act. The claim had been disallowed because the wage earner had failed to furnish the required proof of age at the time he filed his application for benefits. The Social Security Administration awarded the appellee a lump sum death payment but ruled that the appellee as executor was not entitled to receive primary insurance benefits under the Act. The District Court held that the appellee was entitled to recover from the appellant the primary insurance benefits. An appeal followed, and at page 783, the Court stated:

"• • • when the application was filed the three conditions or facts necessary under the statute to entitle
69 the wage earner to receive the monthly primary insurance benefit actually existed. His right to the monthly primary insurance benefit accrued at that time. • • • In the absence of an express provision in the statute to the contrary, the furnishing of such proof is a condition precedent to payment, but not to liability."

And at page 784:

"• • • The right of the wage earner to the primary benefit is not a gratuity, but is a property right which can be enforced by court action. Dismuke vs. U.S., 297 U.S. 167, 170; Lynch vs. U.S., 292 U.S. 571."

The holdings of the courts on this point have not, however, been uniform. For example, in the case of *Roston* v. *Folsom*, 158 Fed. Supp. 112, 120, the Court stated:

"It is beyond reason to refer to Social Security benefits as property rights to which one might succeed."

In the same case, there is the following at page 121:

"Social Security is in the nature of insurance. The terms 'insured', 'insurance', and 'beneficiary' are used

throughout the act. The retirement benefits are similar to an annuity; the survivor benefits resemble insurance."

In the case of *Broderick* v. *Squire*, 163 F. 2d 980, the main question presented was whether an employer-employee relationship existed between the appellant and real estate brokers. The Court at page 981 said:

"The Social Security Act, 42 USCA § 301, et seq. was enacted in 1935 to solve the problem of insecurity brought on by old age and unemployment. The method is to provide for payments in the nature of annuities to the elderly and compensation to the unemployed. U.S. vs. Silk, and Harrison vs. Greyvan Lines, 67 S. Ct. 1463, 91 L. Ed. —. Revenue is obtained from the collection of employment taxes."

In connection with a review of the authorities relating to the nature of the benefits conferred by the Social Security Act, one must also consider the power of Congress to alter, repeal or amend the Act. The position of
70 the defendant may be stated simply as this: Congress created this right to benefits—it was a right unknown to the common law, that is, it is a creative or statutory right, and as such Congress may make changes in the Social Security Act and in the rights thereunder from time to time as it sees fit.

In support of this position, the defendant relies upon the fact that Congress from the time of the enactment of the original Act expressly reserved to itself "the right to alter, amend or repeal any provision of this Act * * *." (Title 42, U.S.C., Sec. 1304). The defendant also cites the case of *Mullowney* v. *Folsom*, 156 Fed. Supp. 34. In that case, the claimant became entitled to benefits as of April, 1950. At this time, and up until January 1, 1951, "earnings from self-employment did not affect either benefits payable under the Act or deductions therefrom." (p. 35). Then, on January 1, 1951, an amendment to the Act became effective which amendment "deprived him of Social Security payments by reason of his earnings as a self-employed real estate broker in excess first of $50 a month, and later $75 a month." (p. 35).

The question then presented was whether the plaintiff had a vested right to receive Social Security benefits as of April, 1950 which could not be adversely affected by legislation passed subsequent to that date.

The Court, in granting the motion of the defendant for summary judgment, wrote the following:

> "Social Security payments are made out of the general treasury and are financed by collections made from both employers and employees * * *
>
> "Payments made as a result of Congressional appropriation have not been thus far construed as contractual in their nature * * *
>
> "* * * The statute provides (Title 42, U.S.C., § 1304) as follows:
>
> 'The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress,'
>
> "* * * It results from all the foregoing considerations that in the opinion of this Court, Edward Mullowney did not acquire a vested right in the Social Security payments allotted to him according to the terms of the Certificate to which reference has been made (and as they might be increased), which rendered them immune from the further exercise of Congressional control, pursuant to the terms of the Statute above quoted."

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It appears well at this point to consider the question, namely: To what extent are the rights of public employees who are within the coverage of a statutory pension system vested, so as to render invalid, legislation repealing or modifying the provisions of the pension statute. Although Social Security benefits do not equate, per se, to pension plan payments, in determining the nature of Social Security benefits it has been shown that they are similar to annuities. Annuities, pensions and Social Security benefits are similar in certain characteristics. The recipient under each plan receives payment of benefits usually at the time of his retirement. Also, the sources from which payments are made are composed essentially in the same manner—that is, by contributions, be they voluntary or involuntary. Thus, in determining to what extent the rights of beneficiaries under any system are

vested, a study of these rights under a statutory system (pensions) now seems appropriate. The question is discussed at great length in 52 A.L.R. 2d 440, with a state by state analysis. The following appears at page 443:

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"§. 3. Federal Decisions (in cases involving federal state and territorial pension statutes)

"The decisions of the federal courts, both in cases involving state statutes providing for pensions for public employees, and in cases involving similar federal and territorial enactments, support the general rule that a pension granted by a public authority is not a contractual obligation, but is a gratuitous allowance, in the continuance of which the pensioner has no vested right; accordingly, the pension is terminable or alterable at the will of the grantor.

"• • • The federal courts have held that the rule that a pensioner has no vested right in the pension is applicable to pension systems under which participating employees are required to contribute, on either a voluntary or compulsory basis." (Citing cases in footnotes 4 and 5).

"But an exception to the rule that a pensioner has no vested right in a pension has been drawn in the case of particular pension payments which have become due; the federal courts hold that the pensioner has a vested right in such payments." (Citing cases in footnote 6)

Thus far it is seen that previous decisions of courts have approved the power of legislatures to revise upward or downward payments under pension plans, retirement acts, etc. The most important feature behind this fact is that these revisions were held to be lawful and thus not inconsistent with any provision of the Constitution. Or, as stated in *Constitution of the United States of America* by Corwin (p. 857):

"Rights created by statutes are subject to qualification by Congress; benefits conferred gratuitously may be redistributed or withdrawn at any time (U.S. ex rel Burnett v. Teller, 107 U.S. 64, 68 (1883)."

However, the plaintiff contends that even if the benefits conferred under the statute are deemed to be a gratuity and not an earned right, the deprivation of them still must conform to constitutional requirements. In support of this contention, he relies upon the case of *Steinberg* v. *U.S.*, 163 F. Supp. 590. In that case, the plaintiff retired on February, 1951 and began to receive an annuity under the Civil Service Retirement Act (5 U.S.C., § 691). Subsequently, in September of 1954, he was subpœnæd before a Federal Grand Jury in New York, at which time he invoked the protection of the Fifth Amendment of the Constitution of the United States. The plaintiff was later advised by the defendant that his annuity was temporarily suspended and later this became permanent, such action being pursuant to Title 5, U.S.C. § 704(d).[7] The plaintiff then filed an action claiming that § 740(d) did violence to his rights as a citizen of the United States under the Constitution. The Court by a Decision of three to one granted the motion of the plaintiff for summary judgment.

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Judge Laramore held that the:

> "* * * right of a federal employee to an annuity is not born of a contractual relationship * * * but is more in the nature of a gratuity granted in appreciation for long and faithful service. Congress may in its wisdom modify the payments upward or downward without impairing the obligation of a contract. * * * Although an annuity is paid for past as distinguished from present services, the legal relationship between the parties is in all material respect parallel since a current Federal employee neither has a vested or contractual right to continued employment. Even so, the Supreme Court has said 'that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Wieman* v. *Updegraff*, 344 U.S. 183. Thus we are squarely met with the question as to whether or not it is arbitrary and discriminatory for the Federal government to exclude persons from its annuity rolls who have availed themselves of the protection provided for in the Fifth Amendment."

[7] See Appendix, *Note 7.*

He held that upon the basis of Supreme Court decisions
"such a law is an indiscriminate classification of
74 the innocent with the guilty and must fall as an assertion of arbitrary power." (page 592).

Continuing, Judge Laramore wrote:

> "Furthermore, an act of Congress applying to persons such as plaintiff which inflicts punishment without a judicial trial is a bill of attainder prohibited by the Constitution. U.S. vs. Lovett, 328 U.S. 303; Cummings vs. State of Missouri, 4 Wall. 277; Ex Parte Garland, 4 Wall. 333. In this case the punishment inflicted by the Act was the denial of his annuity without due process. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties which within the meaning of the Constitution is a bill of attainder. Cummings vs. State of Missouri, supra. Notwithstanding that plaintiff had no vested or contractual right to his annuity, we believe that Congress in prescribing a punishment for persons who exercise a constitutional right has acted beyond the scope of the Constitution."

Judge Whitaker concurred in the result reached by the majority but viewed the case in a somewhat different light. He held, notwithstanding the case of *Dodge* vs. *Board of Education*, 302 U.S. 74 and cases subsequent to that case, that, "A federal employee who has retired from the service has a vested right in the retired pay to which he was entitled at the time of his retirement."

Also,

> "When an employee enters the government service he does so relying upon the statute or regulations fixing the current compensation of the office and the amount to which he will be entitled upon retirement. So long as he remains in the government service, Congress of course has the right to change the compensation to be paid to the holder of the office, as well as the retired pay to which he will be entitled upon retirement. The employee takes the office with knowledge,

actual or constructive, of the power of Congress to do this. But after the employee has rendered the services required of him by the Government and severs his connection with the Government, he then becomes entitled to the retired pay in effect at the time of his retirement.

75 "This, I think, is a vested right, because it is compensation for services already rendered. Retired pay is * * * a part of the emoluments of the office."

Judge Whitaker then proceeded to strengthen his view first by an interpretation of Title 4, U.S.C. 401, carried in Title 5, U.S.C. 2254(b),[8] and second, by reference to a number of cases which hold that a person has such a vested right to retirement benefits. (52 A.L.R. 2d 437). He admits that "the decisions of the Federal courts are in the other direction." (p. 595). In his comment on the case of *Dodge* v. *Board of Education, supra,* he writes:

> "I concede full power in the legislature to reduce retired benefits to people on the payroll when the Act was passed, but I deny the power of the legislature to reduce retirement benefits to people who have severed their connection with the Government; in other words to people who have already earned the retired pay in effect at the time of their retirement." (P. 595)

In another case with which he deals in his opinion, *MacLeod* v. *Fernandez,* 101 F. 2d 20, cert. den. 308 U.S. 561, which "expressly held that the retired pay of a retired employee could be reduced by a law passed after the date of his retirement," (p. 596), Judge Whitaker states:

> "I do not agree with the decision in that case. If I am correct in saying that the retired pay is not a pension or a gratuity, but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
>
> "If this view is correct, Congress has taken this vested right without due process of law. I do not think this

[8] See Appendix, *Note 8.*

can be gainsaid and, hence, I do not enlarge upon it." (P. 596).

Chief Judge Jones, while concurring, touches upon an aspect of the case which the other judges did not
76 treat. He states that the United States Government has many obligations calling for the payment of money; the courts determine what obligations exist and their extent thereof, but the power to pay or authorize their payment rests solely in Congress. He writes:

> "If Congress, therefore, chooses to withhold appropriations to pay the government's obligations, or any of them, it is not within the province of the courts to pass upon the wisdom of that decision, nor is it within their power to compel Congress to do otherwise." (Page 593).

He held in regard to retirement benefits that there is a definite contractual relationship which certainly becomes effective upon retirement but that with regard to pensions or gratuities, there is neither a contractual relationship nor a vested right and that Congress may reduce the amount from time to time.

In discussing the Act of Congress in the above-cited case, Chief Judge Jones wrote:

> "* * * But if by the act in the present case, Congress has merely withheld payment by restriction on appropriation or by a refusal to appropriate, the obligation of the United States to the plaintiff stands unimpaired, though unpaid. If this is all the act accomplishes there is nothing to prevent the present or a future Congress from recognizing the obligation to plaintiff by appropriation and payment and neither is there anything to prevent this court from entering judgment in favor of the plaintiff for the amount of the obligation without determining constitutional questions." (Page 593).

In conclusion, he wrote:

> "* * * If the act be construed as an intention on the part of Congress to destroy a right which became vested at the time of retirement, it would be invalid.

But on the other hand if, as seems likely, the intention of the Congress was merely to decline to make an appropriation so long as the condition existed, such action was clearly within the scope of its authority."

77 As seen in the *Steinberg* case, *supra,* different approaches were taken by the different judges in forming a basis for their decisions. However, there was near unanimity on one point, that being that the statute was an arbitrary and unreasonable discrimination between employees who have availed themselves of a constitutional guarantee and those who have not used this guaranteed protection. Judge Madden in his dissent did not agree with this conclusion however.

Is the statute (Title 42 U.S.C. 402(n)) in the present case arbitrarily and unreasonably discriminating. The basis for discrimination is that any one who has been deported under certain paragraphs of Sec. 1251(a) of Title 8, U.S.C. is deprived of his benefits as opposed to those who have not been deported and thus not deprived of their benefits.

From the foregoing, it would be only reasonable to accept the fact that Congress has the right or power to make such amendments and repeals as are necessary from time to time. This is especially true when one realizes that the Act itself deals with what had been, and may even still be, the economic needs of a continually increasing portion of the population. Since the Act deals to a substantial extent with the economy of our nation, a casual glance at the economic history of the country reveals that many fluctuations, some minor, some extreme, have occurred, and it is only reasonable to assume that they will occur in the future.

However, to say that Congress has the right through its legislative enactments to cope with certain problems that may continually arise and that are relative to the purpose for which the Act was passed is one thing, but it is an entirely different thing to say that Congress while legislating and purportedly in accordance with the basic

78 designs and purposes for which the Act was originally passed, can or may deprive a person of a property right is quite another matter. For, as Judge

Whitaker points out in the case of *Steinberg* v. *U. S.*, *supra*, at page 595:

> "* * * If I am correct in saying that the retired pay is not a pension or a gratuity but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
>
> "If this view is correct, Congress has taken this vested right without due process of law. I do not think this can be gainsaid and, hence, I do not enlarge upon it."

It has been seen from the foregoing authorities that Congress may validly revise or alter payments to beneficiaries of pension systems. Their power to reduce payments or to impose conditions to their payment has also been upheld. However, must it logically follow that because Congress has the power to exercise such revision or alteration that it may also completely deprive one of such benefits after they have fully accrued? This Court does not believe so.

As seen previously, the basic conflict is between the power of Congress to legislate in this field and the right of a person to an accrued property right. Prior decisions reveal, although not unanimously, that the nature of such benefits make them property rights, but property cannot be taken from a person without due process of law, that is, 'law of the land.'

This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits be-
79 cause of deportation. The Court grants the plaintiff's motion for summary judgment.

Counsel will submit a proper order.

EDWARD A. TAMM

Dated: 1/13/59

Note 1. Title 42 U.S.C., Sec. 402—*Termination of benefits upon deportation of primary beneficiary.*

(n)(1)If any individual is (after the date of enactment of this subsection) deported under paragraphs (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of Title 8 then, notwithstanding any other provisions of this subchapter—

(A) no monthly benefit under this section or section 423 of this title shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

Section 403(b) and (c) of this title shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as Practicable after the deportation of any individual under any of the paragraphs of section 1251(a) of Title 8 enumerated in paragraph (1) of this subsection, the Attorney General shall notify the Secretary of such deportation.

Note 2. Title 42 U.S.C. Sec. 402—*Conviction of subversive activities, Etc.*

(u)(1) If any individual is convicted of any offense (committed after August 1, 1956) under

(A) chapter 37 (relating to espionage and censorship), chapter 105 (relating to sabotage), or chapter 115 (relating to treason, sedition, and subversive activities) of Title 18, or

81 (B) section 783, 822 or 823 of Title 50,

Then the court may, in addition to all other penalties provided by law impose a penalty that in determining whether any monthly insurance benefit under this section or section 423 of this title is payable to such individual for the month in which he is convicted or for any month thereafter, and in determining the amount of any such benefit payable to such individual for any such month, there shall not be taken into account

(C) any wages paid to such individual or to any other individual in the calendar quarter in which such conviction occurs or in any prior calendar quarter, and

(D) any net earnings from self-employment derived by such individual or by any other individual during a taxable year in which such conviction occurs or during any prior taxable year.

(2) As soon as practicable after an additional penalty has, pursuant to paragraph (1) of this subsection, been imposed with respect to any individual, the Attorney General shall notify the Secretary of such imposition.

(3) If any individual with respect to whom an additional penalty has been imposed pursuant to paragraph (1) of this subsection is granted a pardon of the offense by the President of the United States, such additional penalty shall not apply for any month beginning after the date on which such pardon is granted.

Note 3.

Excerpts of letter from Secretary of Health, Education and Welfare to the Senate Finance Committee of March 28,

1956. (Hearings before the Committee on Finance of the U. S. Senate, 84th Congress, Second Session, on Social Security Amendments for 1955; p. 1318-1319)

"An individual establishes rights to benefits under the old-age and survivors insurance program by working in employment or self-employment covered by the law and paying social security contributions on his earnings. The costs of benefits and administration are met in their entirety from the contributions of covered workers, their employers and self-employed persons. There is no contribution from general tax revenues.

* * *

"* * * if benefit rights of persons convicted of
82 these crimes were terminated, a worker insured under old-age and survivors insurance would suffer a greater punishment than an individual whose work was in noncovered employment or who was not dependent on earnings from employment for his support. The punishment would be one that would last for the rest of the individual's life * * *

"As in the case of private pension and group insurance payments and as in the case of wages and salaries, benefits under old-age and survivors insurance are work-connected payments. It is this work connection—the fact that they are earned through work—that establishes the basic character of the benefits. Hence, under present law benefits are paid to an insured worker and his eligible dependents or survivors without taking into account his attitudes, opinions, behavior, or personal characteristics. The right to benefits having been earned, the individual's actions do not modify or restrict that right.

"Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs, and to other crimes which, while perhaps different in degree, are difficult to distinguish in principle."

Note 4. Excerpts of letter from the Director of the Bureau of the Budget to the Chairman of the Finance Committee. (Hearings before the Committee on Finance of the U. S. Senate, 84th Congress, 2nd Sess., on Social Security Amendments for 1955, p. 1342).

"It has always been stressed by the Congress that old age and survivors insurance is not a Federal bounty, but rather a separate self-financed system of insurance, the costs of which are shared equally by employer and employee; that benefits are assured as a matter of statutory right; that the Federal Government is merely a trustee of the system and not a contributor; and that certain benefits are available to surviving dependents of an insured individual without any rights of election or other voluntary action on the part of the insured wage earner. The proposed amendment does not seem consistent with these principles * * *

"A further question involves the retroactive character of the amendment, since it would deny benefits based on contributions predating its enactment. This raises a legal and policy question as to the propriety of such retrospective action which should be resolved only after careful analysis extending to the whole range of civil disabilities and penalties which may be imposed on individuals convicted of the particular crime."

83 *Note 5.* Title 42 U.S.C. Sec. 401—*Federal old-age and survivors insurance trust fund and Federal disability insurance trust fund.*

(a) There is created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors Insurance Trust Fund." The Federal Old-Age and Survivors Insurance Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, which securities and amount the Secretary of the Treasury is authorized and directed to transfer to the Federal Old-Age

and Survivors Insurance Trust Fund, and, in addition, such amounts as may be appropriated to, or deposited in, the Federal Old-Age and Survivors Insurance Trust Fund as hereinafter provided * * *"

Note 6. Title 42 U.S.C. Sec. 402. *Old Age and survivors insurance benefit payments—*

Old Age insurance benefits.

(a) Every individual who

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65, shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) of this section, such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

Note 7. Title 5 U.S.C. Sec. 740(d)

There shall not be paid to any person who has failed or refused, or fails or refuses, prior to, on, or after the date of enactment of this Act, upon the ground of self-incrimination to appear, testify, or produce any book, paper, record, or other document, with respect to his service as an officer or employee of the Government or with respect to any relationship which he has had or has with a foreign government, in any proceeding before a Federal grand jury, court of the United States, or congressional committee, or to the survivor or beneficiary of such person, for any period subsequent to the date of such failure or refusal of such person or the date of enact-

ment of this Act, whichever is later, any annuity or retired pay on the basis of the service of such person as a officer or employee of the Government.

Note 8. Title 5 U.S.C. 2254(b) *Consent to deductions.*

Each employee or Member shall be deemed to consent and agree to such deductions from basic salary, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services during the period covered by such payment, except the right to the benefits to which he shall be entitled under this chapter, notwithstanding any law, rule or regulation affecting the individual's salary.

(File endorsement omitted in printing)

85 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, *Plaintiff*,

v.

ARTHUR S. FLEMMING, *Defendant*.

Order Pursuant to Memorandum—January 21, 1959

The above action came on before the Court on cross-motions for summary judgment. The Court having considered the pleadings in the case, the entire record including the record of the administrative proceedings before the Social Security Administration, and the briefs filed by the parties, and having heard argument in open court, and having filed an opinion on January 14, 1959, which opinion constitutes this Court's findings of fact and conclusions of law, it is by the Court this 21st day of January, 1959,

ORDERED, ADJUDGED and DECREED:

1. That defendant's motion for summary judgment be, and it is hereby, denied.

2. That plaintiff's motion for summary judgment be, and it is hereby, granted.

3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

4. That the defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

86 5. That the clerk of the Court be, and he is hereby authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C.

EDWARD A. TAMM,
Edward A. Tamm, *Judge*

(File endorsement omitted in printing)

87 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1154-58

EPHRAM NESTOR, Bul. Rusky No. 5, Sofia, Bulgaria,
Plaintiff,

v.

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare, Washington, D. C., *Defendant*.

Amended Order of February 20, 1959

Upon consideration of defendant's Motion to alter and amend the final order of this Court, dated January 21, 1959, which decreed

"1. That defendant's motion for summary judgment be, and it is hereby, denied.

"2. That plaintiff's motion for summary judgment be, and it is hereby granted.

"3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

"4. That the defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

"5. That the clerk of the Court be, and he is hereby
88 authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C."

it is this 20th day of February, 1959,

ORDERED, that the foregoing Order of January 21, 1959, be and the same hereby is amended by striking therefrom paragraph numbered 4 thereof.

F. DICKINSON LETTS
F. Dickinson Letts
United States District Judge.

Consented to this 4th day of February, 1959:

DAVID REIN
David Rein
Counsel for Plaintiff.

JAMES C. HISE
James C. Hise
Counsel for Defendant.

(File endorsement omitted in printing)

89 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, *Plaintiff*,

v.

ARTHUR S. FLEMMING, Secretary of Health Education and Welfare, *Defendant*

Notice of Appeal to the Supreme Court of the United States—Filed February 20, 1959

I. Notice is hereby given that Arthur S. Flemming, Secretary of Health, Education and Welfare, the defendant above named, hereby appeals to the Supreme Court of the United States from the final order granting plaintiff's motion for summary judgment, entered in this action on January 21, 1959, as amended on February 20, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1252.

* * * * * * * * * *

90 III. The following question is presented by this appeal:

Whether an alien who has been awarded and has commenced to receive monthly social security benefits under Title II of the Social Security Act (42 U.S.C. §§ 401-425) has a vested or "property" right to the continued receipt of such benefits, of such a nature that the suspension of such payments, pursuant to express statutory direction, following his deportation from this country deprives him of property without due process of law, where the statute commanding such suspension (*viz.*, Section 202(n) of the Social Security Act, as amended, 42 U.S.C. (Supp. V) § 402(n), providing in substance that no monthly social security benefit shall be paid to any person who has been deported under any of various designated paragraphs of Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a), until his lawful readmittance to the United States for permanent residence) was enacted prior

to the date on which the alien first became eligible for any social security benefits.

JAMES C. HISE
James C. Hise,
Attorney, Department of Justice
Attorney for Arthur S. Flemming,
Secretary of Health, Education and Welfare
Washington 25, D. C.

20th FEBRUARY 1959.

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91 AFFIDAVIT OF SERVICE (omitted)

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92 Clerk's Certificate to foregoing Transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Postponing Jurisdiction—June 22, 1959

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 22, 1959

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No. [redacted] 54

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Solicitor General,
J. WALTER YEAGLEY,
Acting Assistant Attorney General,
PHILIP R. MONAHAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No.

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the District Court, holding Section 202(n) of the Social Security Act unconstitutional, is reported at 169 F. Supp. 922, and is set forth in Appendix A, *infra*, pp. 21-48.

JURISDICTION

This suit was instituted under Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g), to review a decision by the Social Security Adminis-

tration, Department of Health, Education, and Welfare, suspending the payment of monthly social security benefits under Title II of the Social Security Act (42 U.S.C. 401-425) to a deported alien, as required by law. The order of the District Court was entered on January 21, 1959, and amended on February 20, 1959 (Appendix A, *infra*, pp. 49-52). A notice of appeal to this Court was filed in the District Court on February 20, 1959. The jurisdiction of this Court to review by direct appeal the decision entered in this cause is conferred by 28 U.S.C. 1252; *Reid* v. *Covert*, 351 U.S. 487, 489; *Fleming* v. *Rhodes*, 331 U.S. 100, 102-104.

QUESTION PRESENTED

Whether an alien who has been awarded and has commenced to receive monthly social security benefits under Title II of the Social Security Act (42 U.S.C. 401-425) has a vested or "property" right to the continued receipt of such benefits, of such a nature that the suspension of such payments pursuant to express statutory direction, following his deportation from this country, deprives him of property without due process of law, where the statute commanding the suspension—Section 202(n) of the Social Security Act, as amended, 42 U.S.C., Supp. V, 402(n), providing that no monthly social security benefit shall be paid to any person who has been deported under any of various designated paragraphs of Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. 1251(a), until his lawful readmittance to the United States for permanent residence—was enacted prior to the date on which the alien first became eligible for any social security benefits.

STATUTES INVOLVED

The pertinent provisions of Section 202(n) of Title II of the Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 622), as amended by the Act of September 1, 1954, c. 1206, § 107, 68 Stat. 1083 (42 U.S.C., Supp. V, 402(n)), and of Section 241(a) of the Immigration and Nationality Act (Act of June 27, 1952, c. 477, 66 Stat. 163, 204) (8 U.S.C. 1251(a)) are set forth in Appendix B, *infra*, pp. 53-63.

STATEMENT

Appellee is an alien who immigrated to the United States from Bulgaria, and who was deported to his native country on July 7, 1956, pursuant to paragraph (6)(C)(i) of Section 241(a) of the Immigration and Nationality Act (Appendix B, *infra*, pp. 54, 56), as an alien who had been after entry a member of the Communist Party of the United States (R. 1-2, 48-49).[1]

Appellee became entitled to social security benefits on November 13, 1955, by virtue of having attained the age of 65 (R. 12, 51). He filed an application for such benefits on December 2, 1955 (R. 37-41), and on March 7, 1956, received an award of $55.60 per month effective as of November 1955 (R. 51).

On August 31, 1956, subsequent to appellee's deportation, the Bureau of Old-Age and Survivors

[1] The opinion below (Appendix A, *infra*, p. 21) states that appellee's deportation was effected pursuant to "paragraph (1)" of Section 241(a) of the Immigration and Nationality Act. The correct statutory designation is, however, as indicated in the text, paragraph (6)(C)(i) of Section 241(a). The reference in the opinion below apparently originated from a mistaken reference in the Social Security administrative record (repeated in appellant's memorandum in opposition to appellee's motion for summary judgment), to "paragraph (1) of Section 241(a)" as the statutory basis of appellee's deportation (R. 49).

Insurance of the Social Security Administration, Department of Health, Education, and Welfare ("the Bureau"), was notified by the Attorney General, as required by paragraph (2) of Section 202(n) of the Social Security Act (Appendix B, *infra*, p. 54), that appellee had been deported (R. 13, 48). The Bureau, in conformance with the mandatory provisions of paragraph (1) of said Section 202(n) (Appendix B, *infra*, pp. 53-54), suspended payment of appellee's old-age benefits, effective as of September 1956 (R. 12, 52).[2] Notice of the suspension was given to appellee's wife (R. 55).

On February 26, 1957, appellee appointed his wife and an attorney as his representatives in an effort to have his old-age benefit payments reinstated and paid to him in Sofia, Bulgaria (R. 53), and on the same day filed a request for a hearing with the Social Security Administration (R. 21). Pursuant to Section 205(b) of the Social Security Act (42 U.S.C., Supp. V, 405(b)), a hearing was held before a referee of the Office of Appeals Council in the Social Security Administration on December 30, 1957 (R. 22-36). On January 31, 1958, the referee sustained the Bureau's action suspending the payment of benefits (R. 12-14). On February 12, 1958, appellee requested a review of the referee's decision by the Appeals Council (R. 10) and on March 13, 1958, the Appeals Council informed appellee that his request was denied (R. 9).[3]

On May 5, 1958, appellee instituted this action in the

[2] The Bureau, by inadvertence, paid benefits to appellee for the month of September 1956 (R. 52).

[3] Under applicable regulations, 20 C.F.R. 422.6, the Council has discretionary power to grant or deny a request for a review of a decision rendered by one of its referees.

United States District Court for the District of Columbia (R. 1-2), seeking statutory review of the administrative decision pursuant to Section 205(g) of the Social Security Act (42 U.S.C. 405(g)). The complaint alleged that the action of the appellant in suspending the benefit payments to the appellee, "pursuant to the provisions of section 202(n) of the Social Security Act," was illegal and unconstitutional (R. 2).[4] On January 21, 1959, on motion by appellee and cross motion by appellant for summary judgment (R. 57, 58), appellee's motion was granted (Appendix A, *infra*, pp. 49-50; R. 78-79, 85-86).[5] The court held that Section 202(n), as here applied, is repugnant to the due process clause of the Fifth Amendment because it deprived appellee of a "property right" which had "fully accrued" to him (Appendix A, *infra*, p. 41). In summary, the court said (*ibid.*):

> This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits because of deportation.[6]

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[4] In his memorandum of points and authorities in support of his motion for summary judgment, appellee conceded that "[t]he sole issue in the case * * * is the constitutionality of section 202(n) of the Social Security Act."

[5] On February 20, 1959, the order of the District Court granting appellee's motion was, with the consent of counsel for appellee, amended in a respect not pertinent here (R. 87-88; Appendix A, *infra*, pp. 51-52).

[6] Neither party in the court below requested the convening of a three-judge court pursuant to 28 U.S.C. 2282 (forbidding the granting of injunctions restraining the enforcement, operation or execution of Acts of Congress for repugnance to the Constitution otherwise than by three-judge district courts). While we think the convocation of such a court was unnecessary for the reasons stated immediately below, the question is not, in our opinion,

THE QUESTION IS SUBSTANTIAL

The question of the validity of an Act of Congress making mandatory the suspension of a deported alien's social security benefits until such time as he may be lawfully readmitted to the United States for permanent residence is of plain importance. Appellee happens to be an alien whose deportation was based on past (post-entry) membership in the Communist Party (paragraph (6)(C)(i) of Section 241(a) of the Immigration and Nationality Act). But the provision of the Social Security Act which has been declared invalid by the judgment appealed from (Section 202(n); Appendix B, *infra*, pp. 53-54) applies, with a

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wholly free of doubt. Since the issue is jurisdictional (*Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977; *Stratton* v. *St. Louis Southwestern Railway*, 282 U.S. 10, 15-18), we mention it so that the Court, should it take a different view, may take appropriate action (see *Federal Housing Administration* v. *The Darlington, Inc.*, *supra*) without reaching the merits of this appeal. (Or the Court may wish to defer consideration of the jurisdictional issue until the hearing of the merits of the appeal, should it note probable jurisdiction.)

The argument that a single judge was without power to grant the relief prayed for in appellee's complaint and that a three-judge court was required to be convoked is based on the fact that (arguably at least) what the complaint sought, in substance if not in form, was injunctive relief—restraint of the enforcement of Section 202(n) of the Social Security Act for repugnance to the Constitution. As against that argument, it is to be noted that the complaint (R. 1-2), entitled "Complaint for Statutory Review" (R. 1), was brought under and invoked the jurisdiction of the court under Section 205(g), the statutory review provision of the Social Security Act (42 U.S.C. 405(g)). Section 205(g) provides in pertinent part that "Any individual, after any final decision of the Administrator made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action * * * brought in [an appropriate] district court * * *. * * * The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a

few exceptions (see *infra*, pp. 18-19), to all deported aliens.[7] The holding of the District Court involves an interpretation of the Fifth Amendment which is in conflict with prior judicial decisions, and rests, we believe, upon a misconception of the congressional policy un-

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rehearing. * * *." In short, this special statutory procedure is for a general "civil action" to "review" the administrative decision, in which the court is to affirm, modify, or reverse that decision. The gist of the proceeding is the "review" of the administrative determination. In decisions dealing with similar statutory review provisions, it has been held that the judicial review thus authorized extends to every legal question which the claimant is entitled to raise, including constitutional issues, and is not limited to questions of statutory construction, sufficiency of the evidence, and mere regularity of procedure. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345-346; *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 135, 137-139; *Lee* v. *Roseberry*, 94 F. Supp. 324, 327 (E.D. Ky.). In view of this, it seems very likely that the special statutory review procedure provided for by Section 205(g) furnishes the exclusive remedy with respect to determinations under the Social Security Act, including challenges to the constitutionality of specific provisions of the Act, so that the three-judge provision of 28 U.S.C. 2282 (which would have applied in the absence of Section 205(g)) does not govern in this class of case. See *Lee* v. *Roseberry*, *supra*, 94 F. Supp. at 328.

Furthermore, we note that appellee's complaint for statutory review did not in terms request injunctive relief. And it is precisely the request for such relief, not merely that the validity of an Act of Congress is drawn in question, that makes appropriate and necessary the convocation of a three-judge court. *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243, 250. Indeed, the administrative order suspending appellee's benefits had already been entered at the time of the filing of the complaint, and had in fact been outstanding for some eight months when the complaint was filed (*supra*, pp. 4-5). For this reason, the complaint cannot be considered a petition for injunctive relief in the usual sense of a suit to enjoin the taking of future action feared or threatened, although it can be said that there was implicit in the complaint a request to restrain the *continued* suspension of appellee's benefits.

[7] It applies to aliens deported under any one of all but four of the 18 paragraphs under Section 241(a) defining the categories of aliens whom the Attorney General is required to deport (Appendix B, *infra*, pp. 53, 54-63).

derlying the national social security program. In addition, the decision may affect adversely the administration of Section 202(t) of the Act (42 U.S.C., Supp. V, 402(t)), which, with certain qualifications, requires the suspension of benefits to any alien who voluntarily absents himself from the United States for longer than six months if he does not have forty quarters of coverage.[8] Finally, the decision, based as it is upon a "vested interest" concept of the nature of social security benefits, would seem to cast doubt, at least, upon the constitutionality of a number of other provisions of the Social Security Act, *e.g.*, the provision requiring that monthly benefits be reduced (or even totally eliminated) in the case of beneficiaries under the age of 72 who earn in excess of $1,200 per year (Section 203(b)(1) and (e)(2), 42 U.S.C., Supp. V, 403(b)(1) and (e)(2)).

1. As noted *supra*, p. 5, the District Court's decision is bottomed on the assumption that the Social Security Administration's award in March 1956 of monthly benefits to appellee in the amount of $55.60 per month, effective as of November 1955, vested in him an "accrued property right" (Appendix A, *infra*, p. 41), of which he was deprived without due process when those payments were suspended—pursuant to the express mandate of Congress, enacted prior to the time appellee commenced to receive or became eligible to receive any social security benefits—following his de-

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[8] This suspension does not apply, *inter alia*, to aliens of a foreign nation which permits citizens of the United States to draw benefits under its own welfare programs while living outside that foreign nation or to aliens with forty quarters of coverage or who had resided for ten years or longer in the United States.

portation in July 1956. This assumption is erroneous, and at war with the entire philosophy underlying the Social Security Act. As against the right of Congress, expressly reserved from the time of the original enactment of the Social Security Act (Section 1104, 49 Stat. 648, 42 U.S.C. 1304), "to alter, amend, or repeal any provision of this Act," there can be no "vested" or "property" right to old-age or survivors' benefits under Title II of the Social Security Act, and nobody can acquire any such right.

The right to benefits under the Social Security Act is a statutory, conditional right, which the possessor takes and holds subject to the conditions which Congress has attached. It is a "creative right," as has been said, whose nature and character "are dependent upon the statute creating it." *Ewing* v. *Risher*, 176 F. 2d 641, 644 (C.A. 10). "[A] person only has a right to Social Security payments to the extent that such right is supported by the provisions of the statute. Such a right is the creature of the Act and does not exist without it. Such right may come into being only upon strict adherence to the conditions set forth in the Social Security Laws." *Price* v. *Folsom*, 168 F. Supp. 392, 398 (D. N.J.).

The old-age monthly benefits program which Title II of the Social Security Act establishes is not in any true sense a federally-administered "insurance" program under which each worker pays "premiums" over the years and acquires at retirement age an indefeasible right to receive for life a fixed monthly benefit, or "annuity", irrespective of the amount of his current earnings or of other conditions. While the Act uses the term "insurance" (see, *e.g.*, §§ 201, 202, 42 U.S.C. 401,

402), the true nature of the program is to be determined from its actual incidents.

The "contribution" exacted under the social security plan from an employee in covered employment, in the form of payroll deductions made by the employer on behalf of the Government and paid into the general Treasury, is a true *tax*.[9] *Helvering* v. *Davis*, 301 U.S. 619, 635, 645-646. It is not comparable to a premium under a policy of insurance promising the payment of an annuity commencing at a designated age. The statutory authorization for the payroll deduction is codified in the Internal Revenue Code and reads: "In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages * * *." 26 U.S.C., Supp. V, 3101. The employer's contribution is an "excise tax" levied on his employees' payrolls. 26 U.S.C., Supp. V, 3111. These tax levies are "paid into the Treasury of the United States as internal-revenue collections." 26 U.S.C., Supp. V, 3501. The collections are not earmarked in any way. See *Helvering* v. *Davis*, *supra*, 301 U.S. at 635. The so-called "Trust Fund" established by Section 201 of the Social Security Act (42 U.S.C., Supp. V, 401), from which benefits are paid to eligible individuals, is maintained by standing annual appropriations made by Congress "out of any moneys in the Treasury not otherwise appropriated" (Section 201(a), 42 U.S.C., Supp. V, 401(a)). That the con-

[9] The "tax" provisions applicable to the social security system were originally contained in Title VIII of the Social Security Act (49 Stat. 636), entitled "Taxes With Respect to Employment." It provided, *inter alia*, for an "Income Tax on Employees" and an "Excise Tax on Employers" (49 Stat. 636, 637).

tributions are true "taxes" is firmly established. *Helvering* v. *Davis, supra; Cain* v. *United States*, 211 F.2d 375, 377 (C.A. 5), certiorari denied, 347 U.S. 1013; *Abney* v. *Campbell*, 206 F.2d 836, 841 (C.A.5), certiorari denied, 346 U.S. 924.

Payment of these taxes, moreover, is not the test in determining eligibility for benefits under Title II of the Social Security Act. The determining factor is past employment of such character as falls within the purview of the term "employment" under the Act. Section 210(a), 42 U.S.C. 410(a). The only necessary prerequisite for entitlement to benefits is a record in the Bureau of Old-Age and Survivors Insurance showing a minimum covered wage for a specified period of time. Section 214, 42 U.S.C. 414. See also *Analysis of the Social Security System*, Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83rd Cong., 1st Sess., pp. 962-963 (1953). Benefits are computed individually in each case on the basis of earnings in covered employment, rather than on the basis of the amount of taxes which an individual has paid while in such employment (*id.*, p. 948). A striking example of the lack of correlation between taxes paid and benefits received is the provision for the reduction (and possible total elimination) of monthly benefits in the case of beneficiaries under the age of 72 who earn in excess of $1,200 per year (Section 203(b)(1) and (e)(2), 42 U.S.C., Supp. V, 403(b)(1) and (e)(2)). Another example of such lack of correlation is the wage credit which was afforded to servicemen by the 1950 amendments to the Act (Act of August 28, 1950, c. 809, Title I, § 105, 64 Stat. 512, 42 U.S.C. 417). A third example lies in the fact that the benefits

payable in the early years of the social security program were far in excess of the benefits that would have been payable if the employee's own social security tax-levies, or "contributions", had been used to purchase an "annuity" under a private policy of insurance." *Analysis of the Social Security System*, Hearings, etc., *supra*, p. 943.

These facets of the social security program establish that the benefits payable thereunder are, in legal terms, of the nature of statutory pension benefits, or gratuities, rather than "vested" or "property" rights. Consistent with this view is the ruling of the Internal Revenue Service that monthly benefit payments are voluntary payments to the recipient by the Government—not in the nature of purchased annuities or additional wages—and hence within the scope of former Section 22(b)(3) of the Internal Revenue Code of 1939 (now 26 U.S.C., Supp. V, 102) exempting from taxation "the value of property acquired by gift * * *." I.T. 3447, Int. Rev. Cum. Bull., 1941-1, p. 191; *Analysis of the Social Security System*, Hearings, etc., *supra*, pp. 970-975.

Similarly, the Bureau of Employees' Compensation, Department of Labor, considers social security benefits to be in the nature of gratuities rather than "salary, pay, or remuneration" within the meaning of Section 7 of the Federal Employees' Compensation Act, 5 U.S.C. 757.[10] See *Analysis of the Social Security System*, Hearings, etc., *supra*, pp. 976-979. And see

[10]Section 7 prohibits the payment of any salary, pay or remuneration while the injured employee is in receipt of workmen's compensation under the Federal Employees' Compensation Act, and

Helvering v. *Davis*, *supra*, 301 U.S. 619, 640, where this Court noted that the "scheme of benefits" created by Title II of the Social Security Act is constitutional under the power of Congress to "spend money in aid of the 'general welfare' ".

This Court has also pointed out in *Lynch* v. *United States*, 292 U.S. 571, 576-577, the difference between insurance, which creates vested rights, and pensions and other gratuities, involving no contractual obligations. And it has held that an individual claimant acquires no "vested rights" in a gratuity-type benefit paid by the Federal Government to a veteran or to his dependent. "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government which Congress has the right to give, withhold, distribute, or recall, at its discretion." *United States* v. *Teller*, 107 U.S. 64, 68. And again: "Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right." *United States* v. *Cook*, 257 U.S. 523, 527. See also *Dodge* v. *Board of Education*, 302 U.S. 74, 79.[11]

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the question arose as to the nature of the benefit payments under the social security program, where such payments are based upon federal employment.

[11] Constitutional challenges of other provisions of the Social Security Act which reduced or withheld benefits from individuals who (unlike appellee) had fully qualified for and were awarded such benefits *prior* to the enactment of the provisions in question have been rejected. *Price* v. *Folsom*, 168 F. Supp. 392 (D. N.J.) (1954 amendment, reducing the monthly payments to a beneficiary on account of self-employment income, held not to have deprived him of any "vested right"); *Mulcahey* v. *Folsom*, 156 F. Supp. 34 (E.D. N.Y.) (1950 amendment, excluding claimants who were earn-

2. Since, for the reasons just summarized (*supra*, pp. 8-13), the recipient of social security benefits has no vested or "property" right to the continued receipt of such benefits, and since Congress has expressly reserved its "right to alter, amend, or repeal any provision of" the Social Security Act (Section 1104, 49 Stat. 648; *supra*, p. 9), we believe that the suspension of appellee's benefits would have been valid even if the provision of the Social Security Act pursuant to which this action was taken (Section 202(n)) had been enacted *after* appellee became eligible for and commenced to receive his monthly benefits. In fact, however, it was enacted *prior* to the time when

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ing in excess of a stated amount, held not to have deprived an adversely affected beneficiary of any "vested right").

Steinberg v. *United States*, 163 F. Supp. 590 (Ct. Cls.), on which the District Court placed considerable reliance in this case (see Appendix A, *infra*, pp. 34-39, 40-41), is distinguishable in several vital respects. First, *Steinberg* involved an annuity under the Civil Service Retirement Act and a retirement fund towards which the annuitant had contributed over the years through deductions from his salary. Such contributions are not and have never been considered taxes; the retirement benefits under the Civil Service Retirement Act are "part of the inducement for remaining in the Government service" (163 F. Supp. at 593 (concurring opinion)). The payroll deductions under the Social Security Act, on the other hand, are, as we have seen, true taxes, and lack many of the incidents of "contributions" towards a retirement fund, or "annuity." Second, Steinberg's annuity was suspended because he availed himself of a constitutional right (the privilege against self-incrimination). Appellee's benefits were suspended as a consequence of his deportation under a concededly valid statute following proceedings whose legality is not questioned. Third, Steinberg had become entitled to and had been receiving his annuity for several years prior to the enactment of the statute under which his annuity was suspended. On the other hand, Section 202(n) of the Social Security Act, the statutory authority for the suspension of appellee's benefits, was enacted and took effect (as we point out *infra*, pp. 14-16) prior to his becoming eligible to receive any such benefits.

appellee first became eligible to receive any such benefits.[12] Thus, at the time he first became eligible to receive and commenced to receive benefits, the statutory provision pursuant to which those benefits were later suspended was already on the books. This, in short, is not a case in which Congress enacted a law having the effect of terminating or suspending a person's social security benefits after he had become entitled to and begun to receive them, but one in which the statutory basis for the suspension was already present when the beneficiary first became eligible for benefits. He thus took his benefits subject to their later suspension pursuant to an already existing law.[13] For this reason, the considerations arguing against the notion of any one's having a "vested right" in the continued receipt of social security benefits which

[12] Section 202(n) was enacted and took effect September 1, 1954. Appellee first became eligible to receive social security benefits in November 1955 (*supra*, p. 3).

[13] The District Court said in its opinion that it did not believe that Congress may "completely deprive one of [social security] benefits after they have fully accrued" (Appendix A, *infra*, p. 41). This observation of the court may lead to an incorrect inference. As we have pointed out in the text, appellee's entitlement to benefits had *not* "accrued" as of the time of the enactment of Section 202(n); and it was under the terms of that provision that his benefits, which began later, were suspended. His deportation, it is true, took place after his entitlement to benefits accrued, and it was his deportation which occasioned the suspension of his benefits. But the statutory authority for the suspension substantially antedated his original qualifying for benefits.

Although the facts are not revealed in the record in the court below, the Department of Justice files indicate that the deportation proceedings against appellee commenced as early as October 1953, and the Board of Immigration Appeals dismissed his appeal from the order of deportation on November 9, 1954—more than a year prior to the time he first became eligible and applied for social security benefits (November 13 and December 2, 1955, respectively; see *supra*, p. 3). He was not actually deported until July 1956.

have once begun (*supra*, pp. 8-13) have especial force and application in this instance.

3. This case involves no question of an arbitrary cutting off by Congress of social security benefits to which a recipient would be otherwise entitled. Appellee is a deported alien. It was not unreasonable for Congress to amend the social security program so as to confine the benefits payable thereunder to citizens and alien residents of this country. The social security program was enacted to promote the "general welfare" (*Helvering* v. *Davis*, *supra*, 301 U.S. 619, 640) of the residents of *this* country. Since the Government's power to terminate its hospitality to aliens is well settled (*Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587, and cases cited), it would be anomalous to suggest that it lacks the power also to suspend or even terminate welfare benefits—incidents of its hospitality—upon the departure of an alien. While Congress has made appropriations for the economic assistance of foreign countries and their citizens and residents, it is free to keep these programs separate from the social security program, which is primarily designed for the welfare of residents of the United States.

If it be said that it is unfair to an alien deportee to cut off, upon his deportation, the social security benefits which he has begun to enjoy after "contributing" thereto over the years while working in this country, the answer is, as we have seen, that his "contributions" were in reality true taxes, and not premiums contributed towards the purchase of an insurance annuity. Since social security "contributions" are taxes, such an argument can carry no more weight than a conten-

tion that the act of deportation itself is unlawful because it deprives the alien of his right to the enjoyment of the public parks, highways, and community facilities which his income and property tax payments, made prior to deportation, helped to construct and maintain.

It is true that (in cases of those who do not have forty quarters of coverage) Congress has differentiated between deported aliens and aliens who voluntarily absent themselves from this country. In the case of the former, the suspension of benefits commences immediately upon their deportation (Section 202(n)(1)(A), 42 U.S.C., Supp. V, 402(n)(1)(A); Appendix B, *infra*, p. 53). In the case of the latter, suspension does not begin until after they have been outside the United States for six consecutive months (Section 202(t)(1), 42 U.S.C., Supp. V, 402(t)(1)).[14] But this distinction is not unreasonable. Congress may well have felt that the chance of a deported alien's early lawful return to this country (at which time his social security benefits would recommence; see fn. 14) was sufficiently slight to warrant the immediate suspension of his benefit payments following his deportation, but have felt, on the other hand, that the alien who voluntarily leaves the country might well be planning on an early return, so that it would not be feasible or just to suspend his

[14] As noted *supra*, p. 8, the provision for the suspension of benefits payable to aliens who voluntarily absent themselves from the United States is subject to certain qualifications. See, *e.g.*, fn. 8, *supra*, p. 8. Both in the case of deported aliens and aliens who absent themselves voluntarily, payments are not terminated completely, but *suspended*, pending their lawful return (if ever) to this country. See Section 202(n)(1)(A)(ii), 42 U.S.C., Supp. V, 402(n)(1)(A)(ii) (Appendix B, *infra*, p. 53, and Section 202(t)(1)(B), 42 U.S.C., Supp. V, 402(t)(1)(B).

payments during the period of his absence until he had remained abroad for six consecutive months.

It is also true that not all deported aliens are subject to the suspension-of-benefits provisions of Section 202(n). Of the eighteen grounds for deportation enumerated under Section 241(a) of the Immigration and Nationality Act (Appendix B, *infra*, pp. 54-63), fourteen are cited in Section 202(n). However, the District Court's judgment in no way turned on this distinction which Section 202(n) draws between different classes of deportees (see Appendix A, *infra*, pp. 39-40, 41). Moreover, the paragraphs of Section 241(a) of the Immigration and Nationality Act cited in Section 202(n) cover the vast majority of causes of deportation and of deportees; and there are reasonable grounds for the exceptions.[15] In any event, one who

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[15] The only paragraphs of Section 241(a) which are not subject to the suspension provisions of Section 202(n) are paragraphs (3), (8), (9), and (13) of Section 241(a). H. Rept. No. 1699, 83rd Cong., 2d sess., p. 77, characterizes the *included* deportation provisions as involving "deportation because of unlawful entry, conviction of a crime, or subversive activity." The four excluded provisions do not fall into that category, and may have been excluded because Congress thought they did not involve serious derelictions.

In addition, two of the excluded provisions (paragraphs (3) and (8)) deal with persons deported for becoming public charges within five years after entry. It may be that Congress felt (a) that it would be unfair to the other country to deport such destitute persons without letting them retain their modicum of social security benefits, or (b) that such destitute persons, after so few years in this country, would be unlikely to have social security payments coming to them. With respect to paragraph (9), providing for the deportation of persons admitted as nonimmigrants who fail to maintain that status properly, Congress may, here too, have thought it unlikely that such persons would be eligible for social security benefits. Paragraph (13) deals with aliens who, prior to or within five years after entry, aid other aliens to enter this country illegally.

comes within a class as to whom Congress clearly has power to terminate or suspend the payment of social security benefits cannot be heard to object that congressional action accomplishing that result is invalid because Congress failed to make the class of persons affected by such action as large as it might, had it chosen to do so. Cf. *German Alliance Insurance Co.* v. *Kansas*, 233 U.S. 389, 418: "[D]iscrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise." [16]

Here, again, because of the limitation of the scope of the paragraph to the first five years after entry, Congress may have felt that persons coming within this category would be unlikely to have social security payments coming to them, so that it would be improbable that there would be significant numbers of aliens in this class who would present any problem from the standpoint of the remittance of social security payments to foreign countries.

[16] See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584; *Atchison, Topeka and Santa Fe Railroad* v. *Matthews*, 174 U.S. 96, 106. And see *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 578 (C.A. 6), certiorari denied, 335 U.S. 908: "It is * * * well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification if it is not patently irrational and unjustifiable [citing cases]."

CONCLUSION

For the foregoing reasons, it is submitted that the question presented by this appeal is substantial and of public importance, and that probable jurisdiction should be noted.

Respectfully submitted,

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APRIL, 1959.

APPENDIX A

Filed January 14, 1959. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, PLAINTIFF

v.

MARION B. FOLSOM, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

MEMORANDUM OPINION

FACTS

The plaintiff in this case immigrated to the United States in 1913 from Bulgaria. He was employed in the United States in employment covered by the Social Security Act from December of 1936 until January, 1955. In December of 1955, he filed an application for old age benefits, and he received an award of $55.60 per month effective as of November, 1955.

On July 7, 1956, the plaintiff was deported to Bulgaria pursuant to paragraph (1) of Section 241(a) of the Immigration and Nationality Act. On August 31, 1956, the Attorney General of the United States notified the Bureau of Old Age and Survivors Insurance of the the Department of Health, Education and Welfare of the fact that the plaintiff had been deported. The Bureau, pursuant to Section 202(n) of the Social Security Act (Title 42, U.S.C. Sec. 402(n))[1], suspended payment of plaintiff's old age insurance benefits from and after September, 1956. However, it was through

[1] See Appendix, *Note 1*.

inadvertence that the Bureau did pay benefits to the plaintiff for the month of September, 1956.

The plaintiff's wife, Barbara B. Nestor, was given notice of the suspension of payment of old age insurance benefits in November of 1956. In February of 1957, the plaintiff appointed his wife and Irwin Gostin, an attorney, to represent him in his attempts to have the benefit payments reinstated and paid to him in Sofia, Bulgaria.

On January 31, 1958, a decision of a referee of the Department of Health, Education and Welfare was rendered subsequent to a hearing which was held on December 30, 1957, said decision holding that the Bureau properly suspended the payment of benefits to the plaintiff in this case. Following this, on May 5, 1958, plaintiff filed a complaint in this Court for statutory review.

The case is now before this Court on cross-motions for summary judgment, oral argument having been afforded both parties on November 24, 1958.

CONTENTIONS OF PLAINTIFF

The sole issue in this case, according to the plaintiff, is the constitutionality of Section 202(n) of the Social Security Act. He contends that this section of the Act, as applied to him, is unconstitutional. In support of this conclusion, his argument sets forth the following contentions:

1. *Plaintiff is entitled as a matter of right to Social Security Benefits.*

The plaintiff argues that "throughout the history of the Social Security Act, old age insurance benefits have been referred to as a right of the recipient which he has earned and paid for." He also places reliance upon the 1949 Report of House Ways and Means Com-

mittee, President Eisenhower's message of January 14, 1954 (100 Cong. Rec., 83rd Cong., 2nd Session, p. 257), remarks of Senator Millikin (100 Cong. Rec. p. 14382) and also upon the remarks of Senator George (102 Cong. Rec., p. 15110), all of which, in effect, state that Social Security benefits are not charity or "a handout", but rather are paid to the recipient as an earned right and are related in part to the individual's earnings.

2. *Deprivation of Old Age Insurance Benefits is the imposition of a penalty.*

The plaintiff reasons that benefit payments are derived from contributions of covered workers, their employers and self-employed persons. The payments that he claims under the Act were, in fact, earned through his work and are assured as a matter of statutory right. However, Congress has adopted an amendment to the Social Security Act which may deprive a person of old age insurance benefits upon conviction of certain crimes and may actually constitute a part of the sentence imposed upon such person (Title 42 U.S.C., Sec. 402(u)).[2] Therefore, the plaintiff argues that the witholding of his benefits constitutes a penalty.

In reference to this amendment, the plaintiff's conclusion that such deprivation is a penalty is also based upon letters from the Secretary of Health, Education and Welfare to the Senate Finance Committee on March 28, 1956 (Hearings before the Committee on Finance of U.S. Senate, 84th Cong., 2nd Session (pp. 1318-1319))[3] and from the Director of the Bureau of the Budget to the Chairman of the Finance Committee (p. 1342).[4]

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[2] See Appendix, *Note 2*.
[3] See Appendix, *Note 3*.
[4] See Appendix, *Note 4*.

Plaintiff also contends that even if the benefits are a gratuity and not a right, he is still entitled to them and that a deprivation is an imposition of a penalty exercised in nonconformity to constitutional standards.

3. *Deprivation of Old Age Benefits in This Case Violated the Constitution*

The basis for denying to the plaintiff his old age benefits was his deportation which, in turn, was based upon his past membership in the Communist Party. He concedes that deportation based on this activity has withstood constitutional challenge but alleges that the deportation was carried out "solely on the basis that a deportation is not penal in character and is accordingly not subject to the provisions of the ex post facto and bill of attainder clauses of the Constitution, and for the same reason need not conform with the constitutional requirements governing the imposition of a penalty." Consequently, he alleges that the same statute and procedure cannot serve as the basis for the imposition of a penalty. He further alleges that Congress recognized this in 1956 when, by the amendment to the Social Security Act, the imposing of such a penalty (i.e., deprivation of old age insurance benefits) was provided for upon conviction of certain crimes upon the principle that the deprivation was part of the judicial process and was imposed only after a judicial trial.

Plaintiff contends that Sec. 202(n) of the Social Security Act is invalid as an ex post facto law and as a bill of attainder. He further contends that the statute is against the due process clause of the Fifth Amendment to the Constitution because deprivation of the benefits has no relation to the aims of the Social Security Act and that since the Act, itself, does not require moral character as a condition to eligibility,

there is no reason to discriminate against the group of which the plaintiff is a member.

Finally, the plaintiff states that the suspension of benefits was based upon his deportation and this, in turn, was based upon his participation in certain activities which he alleges were protected by the First Amendment. In other words, the real basis for his deportation and subsequent suspension of social security benefits was because of activities in which he could legally participate.

CONTENTIONS OF DEFENDANT

In his opposition to the plaintiff's motion for summary judgment and in support of his cross motion for summary judgment, the defendant alleges that the plaintiff did not have a vested right to receive social security benefits; that suspension of benefits under 202(n) of the Social Security Act is not the imposition of criminal punishment; that the aforesaid section of the Act is constitutional as applied to the plaintiff; and that the findings of fact by the Secretary are supported by substantial evidence and are conclusive.

PURPOSE OF THE ACT

Counsel for the defendant has emphasized the importance of considering the purpose of the Social Security Act. Although counsel for the plaintiff puts little, if any, emphasis on this, it would be well to briefly inquire into the purpose of this legislation.

The Social Security Act of 1935 "provided a system of old-age insurance for persons working in industry and commerce as a long-run safeguard against the occurrence of old-age dependency." (U.S. Code, Cong. Svc., Vol. 2, 81st Cong., 2nd Sess., 1950, p. 3289). Subsequent revisions and amendments through 1946

dealt generally with provisions for broader coverage, supplementary benefits for dependents of the primary beneficiary and determining contribution rates.

Congress, under authority granted to it by the Federal Constitution (Article 1, Sec. 8), saw fit to enact this legislation for the general welfare. Mr. Justice Cardozo, in the case of *Helvering* v. *Davis*, (57 S. Ct. 904; 109 A.L.R. 1319, 1324), wrote the following in discussing the Social Security Act:

> "But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near."

See also: *Ewing* v. *Black*, 172 F.2d 331, 335; *Ray* v. *Social Security Board*, 73 F. Supp. 58, 62.

Insofar as the purpose of the Act may be relevant, it arises in this manner, according to the Government:

> "A condition for the payment of benefits which takes into consideration whether or not the claimant is within or outside the United States is clearly reasonably related to the purpose of the program. The function which Title II of the Social Security Act was designed to serve was to minimize the great and rapidly growing cost of providing for needy aged persons in the United States * * * Certainly it would be pertinent to this purpose to consider, in establishing conditions prerequisite to eligibility for benefits, the physical presence or absence of a potential claimant within the United

States. A fortiori, it is pertinent and reasonable to condition the payment of benefits so as to exclude payment to an individual who has been deported therefrom." (Points and Authorities of defendant's motion p. 6).

With reference to this contention of the defendant, note must be taken of the following from Vol. 100, Cong. Rec., 83rd Cong., 2nd Session, Jan. 25, 1954, p. 736, wherein Congresswoman Mrs. St. George quotes from a letter received by her from the Secretary of Health, Education and Welfare: "As you know, neither United States Citizenship or residence in the United States are requirements for receipt of old-age survivors insurance benefits.

"In 1939, a provision which would have prevented the payment of benefits to otherwise eligible persons who live abroad was considered by the Congress but was not included in the law."

The foregoing statement was relative to a short remark of Mrs. St. George dealing with people who work in the United States and become eligible for old-age pensions and then return to their country of origin. She commented that in some countries it was possible for a foreign national residing in one of these countries to collect old-age pensions from the United States as well as from his own country. She deemed it necessary that legislation to prevent "a rather obvious abuse of the intention of the law should be considered." Congress, in 1956, added subsection (t) to Sec. 402, Title 42, entitled, "Suspension of benefits of aliens who are outside the United States."

The plaintiff, however, contends that the purpose of the Act is immaterial as applied to him. He says that the right of a worker to social security benefits is an earned right and a deprivation of the benefits is a

deprivation of property to which he is entitled, and to deprive him of such benefits is in the nature of an imposition of a penalty and as such must conform with constitutional requirements. In other words, when a person meets the requirements of the Act so as to be eligible for benefits, at that time he comes into possession of an accrued right, or a property right, and, as such, these benefits may then be taken away only in conformance with constitutional requirements.

NATURE OF THE BENEFITS AND POWER OF CONGRESS.

At this point it becomes necessary to determine as far as possible the nature of the benefits conferred under the Social Security Act. Briefly, the fund from which such payments are made was created pursuant to Title 42, U.S.C. 401.[5] The fund itself is made up of taxes which are paid by employees and employers; these taxes being compulsory for the most part. As a practical matter, the monies which supply this fund rarely come under the control of the person from whose wages they are deducted.

In order to be eligible for reception of these benefits, the Act sets forth three conditions precedent. (See Sec. 402(a))[6] Accordingly, once these conditions are fulfilled, the applicant then becomes entitled to benefits. The plaintiff in the present case fulfilled the statutory requirements in December of 1955 and he was awarded monthly benefits effective in November of 1955.

The defendant asserts that the right to benefits conferred pursuant to the statute is a creative right—that is, a statutory conditional right—which the Congress of the United States has the power to alter or terminate. In support of his position, the defendant cites

[5] See Appendix, *Note 5*.

[6] See Appendix, *Note 6*.

the case of *Ewing* v. *Bisher*, 176 F. 2d 641, 10th Cir. (1949) and *Norman* v. *B & O RR Co.*, 294 U.S. 240, 308. The *Ewing* case involved a situation whereby a widow's claim for a lump-sum payment of death benefits was denied on the ground that the claim was not filed within two years of the date of her husband's death, and her claim for widow's insurance benefits was allowed for a shorter time than she claimed because of her failure to file a timely application therefor. The Court at page 644, wrote:

> "* * * The rule is well settled that where a statute creates a right, such as the one in this case, unknown to the common law and limits the time within which the right must be asserted, the limitation defines and controls the right and the right ceases to exist if not asserted within the time fixed in the statute therefor."

Although the above-cited case lends support to the contention of the defendant as to the nature of the benefits conferred, it is readily distinguishable in certain aspects from the present case. The cited case dealt exclusively with the fulfillment of certain conditions precedent as prescribed by statute, whereas in the present case these conditions precedent were fulfilled, and it is the termination of benefits that is being contested.

In the case of *Ewing* v. *Gardner*, 185 F. 2d 781, the appellee, executor of the estate of the decedent brought an action for primary insurance benefits under the Social Security Act. The claim had been disallowed because the wage earner had failed to furnish the required proof of age at the time he filed his application for benefits. The Social Security Administration awarded the appellee a lump sum death payment but ruled that the appellee as executor was not entitled to receive primary insurance benefits under the Act. The

District Court held that the appellee was entitled to recover from the appellant the primary insurance benefits. An appeal followed, and at page 783, the Court stated:

> "* * * when the application was filed the three conditions or facts necessary under the statute to entitle the wage earner to receive the monthly primary insurance benefit actually existed. His right to the monthly primary insurance benefit accrued at that time. * * * In the absence of an express provision in the statute to the contrary, the furnishing of such proof is a condition precedent to payment, but not to liability."

And at page 784:

> "* * * The right of the wage earner to the primary benefit is not a gratuity, but is a property right which can be enforced by court action. Dismuke vs. U.S., 297 U.S. 167, 170; Lynch vs. U.S., 292 U.S. 571."

The holdings of the courts on this point have not, however, been uniform. For example, in the case of *Roston* v. *Folsom*, 158 Fed. Supp. 112, 120, the Court stated:

> "It is beyond reason to refer to Social Security benefits as property rights to which one might succeed."

In the same case, there is the following at page 121:

> "Social Security is in the nature of insurance. The terms 'insured', 'insurance', and 'beneficiary' are used throughout the act. The retirement benefits are similar to an annuity; the survivor benefits resemble insurance."

In the case of *Broderick* v. *Squire*, 163 F. 2d 980, the main question presented was whether an employer-employee relationship existed between the appellant and real estate brokers. The Court at page 981 said:

> "The Social Security Act, 42 USCA § 301, et seq. was enacted in 1935 to solve the problem of insecurity brought on by old age and unemployment. The method is to provide for payments in the nature of annuities to the elderly and compensation to the unemployed. U.S. vs. Silk, and Harrison vs. Greyvan Lines, 67 S.Ct. 1463, 91 L.Ed. ——. Revenue is obtained from the collection of employment taxes."

In connection with a review of the authorities relating to the nature of the benefits conferred by the Social Security Act, one must also consider the power of Congress to alter, repeal or amend the Act. The position of the defendant may be stated simply as this: Congress created this right to benefits—it was a right unknown to the common law, that is, it is a creative or statutory right, and as such Congress may make changes in the Social Security Act and in the rights thereunder from time to time as it sees fit.

In support of this position, the defendant relies upon the fact that Congress from the time of the enactment of the original Act expressly reserved to itself "the right to alter, amend or repeal any provision of this Act * * *." (Title 42, U.S.C., Sec. 1304). The defendant also cites the case of *Mullowney* v. *Folsom*, 156 Fed. Supp. 34. In that case, the claimant became entitled to benefits as of April, 1950. At this time, and up until January 1, 1951, "earnings from self-employment did not affect either benefits payable under the Act or deductions therefrom." (p. 35). Then, on January 1, 1951, an amendment to the Act became

effective which amendment "deprived him of Social Security payments by reason of his earnings as a self-employed real estate broker in excess first of $50 a month, and later $75 a month." (p. 35).

The question then presented was whether the plaintiff had a vested right to receive Social Security benefits as of April, 1950 which could not be adversely affected by legislation passed subsequent to that date.

The Court, in granting the motion of the defendant for summary judgment, wrote the following:

> "Social Security payments are made out of the general treasury and are financed by collections made from both employers and employees * * *
> "Payments made as a result of Congressional appropriation have not been thus far construed as contractual in their nature * * *
> "* * * The statute provides (Title 42, U.S.C., § 1304) as follows:
> 'The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress,'
> "* * * It results from all the foregoing considerations that in the opinion of this Court, Edward Mullowney did not acquire a vested right in the Social Security payments allotted to him according to the terms of the Certificate to which reference has been made (and as they might be increased), which rendered them immune from the further exercise of Congressional control, pursuant to the terms of the Statute above quoted."

It appears well at this point to consider the question, namely: To what extent are the rights of public employees who are within the coverage of a statutory pension system vested, so as to render invalid, legislation repealing or modifying the provisions of the pension statute. Although Social Security benefits do not

equate, per se, to pension plan payments, in determining the nature of Social Security benefits it has been shown that they are similar to annuities. Annuities, pensions and Social Security benefits are similar in certain characteristics. The recipient under each plan receives payment of benefits usually at the time of his retirement. Also, the sources from which payments are made are composed essentially in the same manner —that is, by contributions, be they voluntary or involuntary. Thus, in determining to what extent the rights of beneficiaries under any system are vested, a study of these rights under a statutory system (pensions) now seems appropriate. The question is discussed at great length in 52 A.L.R. 2d 440, with a state by state analysis. The following appears at page 443:

> "§. 3. Federal Decisions (in cases involving federal state and territorial pension statutes)
> "The decisions of the federal courts, both in cases involving state statutes providing for pensions for public employees, and in cases involving similar federal and territorial enactments, support the general rule that a pension granted by a public authority is not a contractual obligation, but is a gratuitous allowance, in the continuance of which the pensioner has no vested right; accordingly, the pension is terminable or alterable at the will of the grantor.
> "* * * The federal courts have held that the rule that a pensioner has no vested right in the pension is applicable to pension systems under which participating employees are required to contribute, on either a voluntary or compulsory basis." (Citing cases in footnotes 4 and 5).
> "But an exception to the rule that a pensioner has no vested right in a pension has been drawn in the

> case of particular pension payments which have become due; the federal courts hold that the pensioner has a vested right in such payments." (Citing cases in footnote 6)

Thus far, it is seen that previous decisions of courts have approved the power of legislatures to revise upward or downward payments under pension plans, retirement acts, etc. The most important feature behind this fact is that these revisions were held to be lawful and thus not inconsistent with any provision of the Constitution. Or, as stated in *Constitution of the United States of America* by Corwin (p. 857):

> "Rights created by statutes are subject to qualification by Congress; benefits conferred gratuitously may be redistributed or withdrawn at any time (U.S. ex rel Burnett v. Teller, 107 U.S. 64, 68 (1883)."

However, the plaintiff contends that even if the benefits conferred under the statute are deemed to be a gratuity and not an earned right, the deprivation of them still must conform to constitutional requirements. In support of this contention, he relies upon the case of *Steinberg* v. *U.S.*, 163 F.Supp. 590. In that case, the plaintiff retired on February, 1951 and began to receive an annuity under the Civil Service Retirement Act (5 U.S.C., § 691). Subsequently, in September of 1954, he was subpoenaed before a Federal Grand Jury in New York, at which time he invoked the protection of the Fifth Amendment of the Constitution of the United States. The plaintiff was later advised by the defendant that his annuity was temporarily suspended and later this became permanent, such action being pursuant to Title 5, U.S.C. § 704(d).[7] The plaintiff then filed

[7] See Appendix, *Note 7*.

an action claiming that § 740(d) did violence to his rights as a citizen of the United States under the Constitution. The Court by a decision of three to one granted the motion of the plaintiff for summary judgment.

Judge Laramore held that the:

> "* * * right of a federal employee to an annuity is not born of a contractual relationship * * * but is more in the nature of a gratuity granted in appreciation for long and faithful service. Congress may in its wisdom modify the payments upward or downward without impairing the obligation of a contract. * * * Although an annuity is paid for past as distinguished from present services, the legal relationship between the parties is in all material respect parallel since a current Federal employee neither has a vested or contractual right to continued employment. Even so, the Supreme Court has said 'that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory' *Wieman* v. *Updegraff*, 344 US 183. Thus we are squarely met with the question as to whether or not it is arbitrary and discriminatory for the Federal government to exclude persons from its annuity rolls who have availed themselves of the protection provided for in the Fifth Amendment."

He held that upon the basis of Supreme Court decisions "such a law is an indiscriminate classification of the innocent with the guilty and must fall as an assertion of arbitrary power." (page 592).

Continuing, Judge Laramore wrote:

> "Furthermore, an act of Congress applying to persons such as plaintiff which inflicts punishment

without a judicial trial is a bill of attainder prohibited by the Constitution. U.S. vs. Lovett, 328 US 303; Cummings vs. State of Missouri, 4 Wall. 277; Ex Parte Garland, 4 Wall. 333. In this case the punishment inflicted by the Act was the denial of his annuity without due process. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties which within the meaning of the Constitution is a bill of attainder. Cummings vs. State of Missouri, supra. Notwithstanding that plaintiff had no vested or contractual right to his annuity, we believe that Congress in prescribing a punishment for persons who exercise a constitutional right has acted beyond the scope of the Constitution."

Judge Whitaker concurred in the result reached by the majority but viewed the case in a somewhat different light. He held, notwithstanding the case of *Dodge* vs. *Board of Education,* 302 U.S. 74 and cases subsequent to that case, that, "A federal employee who has retired from the service has a vested right in the retired pay to which he was entitled at the time of his retirement."

Also,

"When an employee enters the government service he does so relying upon the statute or regulations fixing the current compensation of the office and the amount to which he will be entitled upon retirement. So long as he remains in the government service, Congress of course has the right to change the compensation to be paid to the holder of the office, as well as the retired pay to which he will be entitled upon retirement. The employee takes

the office with knowledge, actual or constructive, of the power of Congress to do this. But after the employee has rendered the services required of him by the Government and severs his connection with the Government, he then becomes entitled to the retired pay in effect at the time of his retirement.

"This, I think, is a vested right, because it is compensation for services already rendered. Retired pay is * * * a part of the emoluments of the office."

Judge Whitaker then proceeded to strengthen his view first by an interpretation of Title 4, U.S.C. 401, carried in Title 5, U.S.C. 2254(b),[8] and second, by reference to a number of cases which hold that a person has such a vested right to retirement benefits. (52 A.L.R. 2d 437). He admits that "the decisions of the Federal courts are in the other direction." (p. 595). In his comment on the case of *Dodge* v. *Board of Education, supra,* he writes:

"I concede full power in the legislature to reduce retired benefits to people on the payroll when the Act was passed, but I deny the power of the legislature to reduce retirement benefits to people who have severed their connection with the Government; in other words to people who have already earned the retired pay in effect at the time of their retirement." (p. 595).

In another case with which he deals in his opinion, *MacLeod* v. *Fernandez,* 101 F. 2d. 20, cert. den. 308 U.S. 561, which "expressly held that the retired pay of a retired employee could be reduced by a law passed

[8] See Appendix, *Note 8.*

after the date of his retirement," (p. 596), Judge Whitaker states:

> "I do not agree with the decision in that case. If I am correct in saying that the retired pay is not a pension or a gratuity, but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
> "If this view is correct, Congress has taken this vested right without due process of law. I do not think this can be gainsaid and, hence, I do not enlarge upon it." (p. 596).

Chief Judge Jones, while concurring, touches upon an aspect of the case which the other judges did not treat. He states that the United States Government has many obligations calling for the payment of money; the courts determine what obligations exist and their extent thereof, but the power to pay or authorize their payment rests solely in Congress. He writes:

> "If Congress, therefore, chooses to withhold appropriations to pay the government's obligations, or any of them, it is not within the province of the courts to pass upon the wisdom of that decision, nor is it within their power to compel Congress to do otherwise." (Page 593).

He held in regard to retirement benefits that there is a definite contractual relationship which certainly becomes effective upon retirement but that with regard to pensions or gratuities, there is neither a contractual relationship nor a vested right and that Congress may reduce the amount from time to time.

In discussing the Act of Congress in the above-cited case, Chief Judge Jones wrote:

> " * * * But if by the act in the present case, Congress has merely withheld payment by restriction on appropriation or by a refusal to appropriate, the obligation of the United States to the plaintiff stands unimpaired, though unpaid. If this is all the act accomplishes there is nothing to prevent the present or a future Congress from recognizing the obligation to plaintiff by appropriation and payment and neither is there anything to prevent this court from entering judgment in favor of the plaintiff for the amount of the obligation without determining constitutional questions." (Page 593).

In conclusion, he wrote:

> " * * * If the act be construed as an intention on the part of Congress to destroy a right which became vested at the time of retirement, it would be invalid. But on the other hand if, as seems likely, the intention of the Congress was merely to decline to make an appropriation so long as the condition existed, such action was clearly within the scope of its authority."

As seen in the *Steinberg* case, *supra*, different approaches were taken by the different judges in forming a basis for their decisions. However, there was near unanimity on one point, that being that the statute was an arbitrary and unreasonable discrimination between employees who have availed themselves of a constitutional guarantee and those who have not used this guaranteed protection. Judge Madden in his dissent did not agree with this conclusion however.

Is the statute (Title 42 U.S.C. 402(n)) in the present case arbitrarily and unreasonably discriminating. The

basis for discrimination is that any one who has been deported under certain paragraphs of Sec. 1251 (a) of Title 8, U.S.C. is deprived of his benefits as opposed to those who have not been deported and thus not deprived of their benefits.

From the foregoing, it would be only reasonable to accept the fact that Congress has the right or power to make such amendments and repeals as are necessary from time to time. This is especially true when one realizes that the Act itself deals with what had been, and may even still be, the economic needs of a continually increasing portion of the population. Since the Act deals to a substantial extent with the economy of our nation, a casual glance at the economic history of the country reveals that many fluctuations, some minor, some extreme, have occurred, and it is only reasonable to assume that they will occur in the future.

However, to say that Congress has the right through its legislative enactments to cope with certain problems that may continually arise and that are relative to the purpose for which the Act was passed is one thing but it is an entirely different thing to say that Congress while legislating and purportedly in accordance with the basic designs and purposes for which the Act was originally passed, can or may deprive a person of a property right is quite another matter. For, as Judge Whitaker points out in the case of *Steinberg* v. *U.S.*, *supra*, at page 595:

> "* * * If I am correct in saying that the retired pay is not a pension or a gratuity but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
>
> "If this view is correct, Congress has taken this vested right without due process of law. I do not

think this can be gainsaid and, hence, I do not enlarge upon it."

It has been seen from the foregoing authorities that Congress may validly revise or alter payments to beneficiaries of pension systems. Their power to reduce payments or to impose conditions to their payment has also been upheld. However, must it logically follow that because Congress has the power to exercise such revision or alteration that it may also completely deprive one of such benefits after they have fully accrued? This Court does not believe so.

As seen previously, the basic conflict is between the power of Congress to legislate in this field and the right of a person to an accrued property right. Prior decisions reveal, although not unanimously, that the nature of such benefits make them property rights, but property cannot be taken from a person without due process of law, that is, 'law of the land.'

This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits because of deportation. The Court grants the plaintiff's motion for summary judgment.

Counsel will submit a proper order.

EDWARD A. TAMM

Dated: 1/13/59.

Filed January 14, 1959. Harry M. Hull, Clerk.

APPENDIX [to the District Court's opinion, *supra*]

Note 1. Title 42 U.S.C., Sec. 402.—*Termination of benefits upon deportation of primary beneficiary.*

(n)(1) If any individual is (after the date of enactment of this subsection) deported under paragraphs (1) (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18), of section 1251(a) of Title 8 then, notwithstanding any other provisions of this subchapter—

(A) no monthly benefit under this section or section 423 of this title shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii)

before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

Section 403(b) and (c) of this title shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 1251(a) of Title 8 enumerated in paragraph (1) of this subsection, the Attorney General shall notify the Secretary of such deportation.

Note 2. Title 42 U.S.C., Sec. 402—*Conviction of subversive activities, etc.*

(u) (1) If any individual is convicted of any offense (committed after August 1, 1956) under

(A) chapter 37 (relating to espionage and censorship), chapter 105 (relating to sabotage), or chapter 115 (relating to treason, sedition, and subversive activities) of Title 18, or

(B) section 783, 822 or 823 of Title 50,

Then the court may, in addition to all other penalties provided by law impose a penalty that in determining whether any monthly insurance benefit under this section or section 423 of this title is payable to such individual for the month in which he is convicted or for any month thereafter, and in determining the amount of any such benefit payable to such individual for any such month, there shall not be taken into account

(C) any wages paid to such individual or to any other individual in the calendar quarter in which

such conviction occurs or in any prior calendar quarter, and

(D) any net earnings from self-employment derived by such individual or by any other individual during a taxable year in which such conviction occurs or during any prior taxable year.

(2) As soon as practicable after an additional penalty has, pursuant to paragraph (1) of this subsection, been imposed with respect to any individual, the Attorney General shall notify the Secretary of such imposition.

(3) If any individual with respect to whom an additional penalty has been imposed pursuant to paragraph (1) of this subsection is granted a pardon of the offense by the President of the United States, such additional penalty shall not apply for any month beginning after the date on which such pardon is granted.

Note 3. Excerpts of letter from Secretary of Health, Education and Welfare to the Senate Finance Committee of March 28, 1956. (Hearings before the Committee on Finance of the U.S. Senate, 84th Congress, Second Session, on Social Security Amendments for 1955; p. 1318-1319)

"An individual establishes rights to benefits under the old-age and survivors insurance program by working in employment or self-employment covered by the law and paying social security contributions on his earnings. The costs of benefits and administration are met in their entirety from the contributions of covered workers, their employers

and self-employed persons. There is no contribution from general tax revenues.

* * *

" * * * if benefit rights of persons convicted of these crimes were terminated, a worker insured under old-age and survivors insurance would suffer a greater punishment than an individual whose work was in noncovered employment or who was not dependent on earnings from employment for his support. The punishment would be one that would last for the rest of the individual's life * * *

"As in the case of private pension and group insurance payments and as in the case of wages and salaries, benefits under old-age and survivors insurance are work-connected payments. It is this work connection—the fact that they are earned through work—that establishes the basic character of the benefits. Hence, under present law benefits are paid to an insured worker and his eligible dependents or survivors without taking into account his attitudes, opinions, behavior, or personal characteristics. The right to benefits having been earned, the individual's actions do not modify or restrict that right.

"Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs, and to other crimes which, while perhaps different in degree, are difficult to distiguish in principle."

Note 4. Excerpts of letters from the Director of the Bureau of the Budget to the Chairman of the Finance Committee. (Hearings before the Committee on Finance of the U.S. Senate, 84th Congress, 2nd Sess., on Social Security Amendments for 1955, p. 1342).

"It has always been stressed by the Congress that old-age and survivors insurance is not a Federal bounty, but rather a separate self-financed system of insurance, the costs of which are shared equally by employer and employee; that benefits are assured as a matter of statutory right; that the Federal Government is merely a trustee of the system and not a contributor; and that certain benefits are available to surviving dependents of an insured individual without any rights of election or other voluntary action on the part of the insured wage earner. The proposed amendment does not seem consistent with these principles * * *

"A further question involves the retroactive character of the amendment, since it would deny benefits based on contributions predating its enactment. This raises a legal and policy question as to the propriety of such retrospective action which should be resolved only after careful analysis extending to the whole range of civil disabilities and penalties which may be imposed on individuals convicted of the particular crime."

Note 5. Title 42 U.S.C. Sec 401—*Federal old-age and survivors insurance trust fund and Federal disability insurance trust fund.*

(a) There is created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors Insurance Trust

Fund." The Federal Old-Age and Survivors Insurance Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, which securities and amount the Secretary of the Treasury is authorized and directed to transfer to the Federal Old-Age and Survivors Insurance Trust Fund, and, in addition, such amounts as may be appropriated to, or deposited in, the Federal Old-Age and Survivors Insurance Trust Fund as hereinafter provided * * * "

Note 6. Title U.S.C. Sec. 402. *Old-Age and survivors insurance benefit payments—*

Old-Age insurance benefits.

(a) Every individual who

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65,

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) of this section, such individual's old-age insurance benefit for any month shall be equal to his

primary insurance amount (as defined in section 415(a) of this title) for such month.

Note 7. Title 5 U.S.C. Sec. 740(d)

There shall not be paid to any person who has failed or refused, or fails or refuses, prior to, on, or after the date of enactment of this Act, upon the ground of self-incrimination to appear, testify, or produce any book, paper, record, or other document, with respect to his service as an officer or employee of the Government or with respect to any relationship which he has had or has with a foreign government, in any proceeding before a Federal grand jury, court of the United States, or congressional committee, or to the survivor or beneficiary of such person, for any period subsequent to the date of such failure or refusal of such person or the date of enactment of this Act, whichever is later, any annuity or retired pay on the basis of the service of such person as an officer or employee of the Government.

Note 8. Title 5 U.S.C. 2254(b). *Consent to deductions.*

Each employee or Member shall be deemed to consent and agree to such deductions from basic salary, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services during the period covered by such payment, except the right to the benefits to which he shall be entitled under this chapter, notwithstanding any law, rule or regulation affecting the individual's salary.

Filed January 21, 1959. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, PLAINTIFF

v.

ARTHUR S. FLEMMING, DEFENDANT

ORDER

The above action came on before the Court on cross-motions for summary judgment. The Court having considered the pleadings in the case, the entire record including the record of the administrative proceedings before the Social Security Administration, and the briefs filed by the parties, and having heard argument in open court, and having filed an opinion on January 14, 1959, which opinion constitutes this Court's findings of fact and conclusions of law, it is by the Court this 21st day of January, 1959,

ORDERED, ADJUDGED and DECREED:

1. That defendant's motion for summary judgment be, and it is hereby, denied.

2. That plaintiff's motion for summary judgment be, and it is hereby, granted.

3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

4. That the defendant, Arthur S. Flemming, Secre-

tary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

5. That the clerk of the Court be, and he is hereby authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C.

/s/ EDWARD A. TAMM,
Judge.

Filed February 20, 1959. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1154-58

EFHRAM NESTOR, Bul. Rusky No. 5, Sofia, Bulgaria, PLAINTIFF

v.

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare, Washington, D. C., DEFENDANT

AMENDED ORDER

Upon consideration of defendant's Motion to alter and amend the final order of this Court, dated January 21, 1959, which decreed

"1. That defendant's motion for summary judgment be, and it is hereby, denied.

"2. That plaintiff's motion for summary judgment be, and it is hereby granted.

"3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

"4. That the defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may

have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

"5. That the clerk of the Court be, and he is hereby authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C."

it is this 20th day of February, 1959,

ORDERED, that the foregoing Order of January 21, 1959, be and the same hereby is amended by striking therefrom paragraph numbered 4 thereof.

/s/ F. DICKINSON LETTS,
United States District Judge.

Consented to this 4th of day of February, 1959:

/s/ DAVID REIN,
Counsel for Plaintiff.
/s/ JAMES C. HISE,
Counsel for Defendant.

APPENDIX B

1. Section 202 (n) of Title II of the Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 622), as amended by the Act of September 1, 1954, c. 1206, § 107, 68 Stat. 1083 (42 U.S.C., Supp. V, 402 (n)), provides in pertinent part:

> Sec. 202 [42 U.S.C., Supp. V, 402]. *Old-age and survivors insurance benefit payments.*
>
> * * * * *
>
> (n) *Termination of benefits upon deportation of primary beneficiary.*
>
> (1) If any individual is (after the date of enactment of this subsection) deported under paragraphs (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—
>
> (A) no monthly benefit under this section[1] * * * shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary [of Health, Education and Welfare] is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence,

[1] I.e., the monthly "old-age insurance benefit" payable to each "fully insured individual" who "has attained retirement age" and has applied therefor pursuant to Section 202 (a) (42 U.S.C., Supp. V, 402 (a)).

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

* * * * *

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241 (a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

2. Section 241 (a) of the Immigration and Nationality Act (Act of June 27, 1952, c. 477, 66 Stat. 163, 204) (8 U.S.C. 1251 (a)) provides in pertinent part:

Sec. 241 [8 U.S.C. 1251]. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 [2] unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (*c*) of this title,[3] or under section 36 (*c*) of the Alien

[2] Section 265 (8 U.S.C. 1305) requires each alien in this country to notify the Attorney General in writing, within 30 days of the first day of January of each year, of his current address and further to notify that official within ten days of each change of address.

[3] Section 266 (*c*) (8 U.S.C. 1306 (*c*)) provides penalties for the willful making by an alien of a false statement in a registration application filed under section 262 (8 U.S.C. 1302), or for the fraudulent procurement of or attempt to procure his own or another's registration.

Registration Act, 1940[4] or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended,[5] or has been convicted under section 1546 of title 18 of the United States Code;[6]

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct pred-

[4] Section 36 (c) of the Alien Registration Act, 1940, 54 Stat. 675, was substantially identical with, and has been superseded by, Section 266 (c) of the Immigration and Nationality Act, whose provisions are described in the preceding footnote.

[5] I.e., the so-called "Foreign Agents Registration Act" (22 U.S.C. 611-621).

[6] Section 1546 of Title 18 punishes the forgery or counterfeiting of visas and other entry documents, and related offenses.

essors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950,[1] unless such

[1] This section (50 U.S.C. 786) requires "Communist-action" and "Communist-front" organizations (as defined in 50 U.S.C. 782) to register with the Attorney General.

aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized Government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the

United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a),* unless the Attorney General is satisfied,

*Section 212 (a) (27) and (29) (8 U.S.C. 1182 (a) (27) and (29)) provide for the exclusion from the United States of aliens who the Attorney General knows or has reason to believe seek to enter the United States to engage in activities prejudicial to the public interest or harmful to the welfare, safety, or security of the United States, or to engage in espionage or sabotage, or to join or affiliate with any organization registered or required to be registered under Section 7 of the Subversive Activities Control Act, of

in the case of any alien within category (C) of paragraph (29) of such section, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248,[9] or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 238 (a)[10] and was without the required period of stay in such foreign contiguous

---

[9] Section 248 (8 U.S.C. 1258) authorizes the Attorney General, with certain exceptions, to change the status of an alien lawfully admitted to the United States as a nonimmigrant from one nonimmigrant classification to any other nonimmigrant classification.

[10] Section 238 (a) (8 U.S.C. 1228 (a)) gives the Attorney General power to enter into contracts with transportation lines for the entry and inspection of aliens coming to the United States through foreign contiguous territory or adjacent islands.

territory or adjacent islands following such arrival * * *;

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs * * *;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a) [11]; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

[11] Section 212 (a) (12) (8 U.S.C. 1182 (a) (12)) provides for the exclusion from the United States of aliens who are prostitutes or who have been supported in whole or in part by the proceeds of prostitution.

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940 [12];

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: * * *; [13] or

---

[12] Title I of the Alien Registration Act, 1940, 54 Stat. 670-671 (popularly known as the "Smith Act"), provided for the punishment of counseling insubordination or refusal of duty on the part of members of the armed forces (§§ 1, 5; now contained in 18 U.S.C 2387) and teaching or advocating or conspiring to teach or advocate the violent overthrow of the Government of the United States (§§ 2, 3, 5; now contained in 18 U.S.C. 2385).

[13] There follow at this point in the text of paragraph 17 a large number of Acts and Criminal Code sections. These include: 18 U.S.C. 793 and 794 (espionage); 18 U.S.C. 2388 (making false reports in time of war to hinder military operations, etc.); Act of October 6, 1917, 40 Stat. 385 (unauthorized manufacture, use, or possession of explosives in time of war); Act of May 22, 1918, 40 Stat. 559 (unauthorized entry into or departure from the United States in time of war); 18 U.S.C. 2151, 2153-2156 (sabotage); Selective Service Acts of 1940 and 1948; Universal Military Training and Service Act; 18 U.S.C. 871 (threats against the President); Trading With the Enemy Act; 18 U.S.C. 2384 (seditious conspiracy); and 18 U.S.C. 960 (setting on foot within the United States or taking part in a military expedition against a friendly foreign power).

(18) has been convicted under section 278 of of this Act [14] or under section 4 of the Immigration Act of February 5, 1917.[15]

[14] Section 278 (8 U.S.C. 1328) punishes the importation of aliens for purposes of prostitution.

[15] Section 4 of the Immigration Act of February 5, 1917, 39 Stat. 878, covered the same subject matter as is now dealt with in Section 278 of the Immigration and Nationality Act (see preceding footnote), and has been superseded by the latter.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 [illegible] 1958

MAY 1 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 54

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *Appellant*

vs.

EPHRAM NESTOR

On Appeal From the United States District Court for the District of Columbia

MOTION TO AFFIRM DECISION BELOW

DAVID REIN
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Washington, D. C.
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 857

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *Appellant*

v.

EPHRAM NESTOR

On Appeal From the United States District Court for the District of Columbia

---

MOTION TO AFFIRM DECISION BELOW

The appellee, Ephram Nestor, pursuant to Rule 16 of the Revised Rules of this Court, moves to affirm the decision below on the ground that the question on which the decision of the case depends is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Whether an alien may constitutionally be deprived of old age insurance benefits which were awarded to him in March 7, 1956 on the basis of contributions

under the Social Security Act made by him and his employers from December 1936 to January 1955, because he was deported in July 1956 for having been a member of the Communist Party in 1933-1939, the statute authorizing his deportation having been enacted in 1950, and the statute authorizing denial of social security benefits having been enacted in 1954.

STATEMENT OF CASE

Appellee, Ephram Nestor, was employed in the United States in employment covered by the Social Security Act from December 1936 until January 1955. (R. 51) Upon reaching retirement age in November 1955, he applied for social security benefits. (R. 37-41) On March 7, 1956, he was awarded such benefits in the amount of $55.60 per month effective as of November, 1955. (R. 51) In July of 1956 (R. 48-49) the appellee was deported from the United States under 8 U.S.C. 1261(a)(6), on the ground of membership in the Communist Party of the United States from 1933 to 1939. (R. 1-2, 4, 57b-57d) After his deportation, the Social Security Administrator, pursuant to the provisions of 202(n) of the Social Security Act, 42 U.S.C., Section 402(n), suspended payment of appellee's old age benefits from and after September 1956. (R. 52) The statute authorizing appellee's deportation was enacted in 1952 (carrying forward a provision first enacted in 1950). The statute authorizing the deprivation of appellee's old age benefits was enacted in 1954. (R. 2-4)

ARGUMENT

Appellant's jurisdictional statement misconceives the nature of the statute and the issue involved in this case. The heart of the government's position is the contention (J.S., p. 16), that the statute must be held

valid because, "It was not unreasonable for Congress to amend the social security program so as to confine the benefits payable thereunder to citizens and alien residents of this country." The statute involved here, however, is not a provision which denies benefits to non-resident aliens. In fact, Congress has consistently refused to enact any such legislation.[1]

Nor are we concerned here with the validity of the more limited provisions of Section 202(t) of the Social Security Act, 42 U.S.C. 402(t) which denies benefits to non-resident aliens who have only a minimal coverage under the Act, who have absented themselves from the country for more than six months, and who have emigrated to countries which deny benefits to American citizens in a similar status.[2] (See J. S., pp. 8, 17).

The statute involved here denies social security benefits not because of non-residence, but because of deportation for certain reasons. A non-resident who has not been deported, or one who has been deported for other reasons, retains his social security benefits. "The bill provides that all benefits payable on the earnings record of an individual who is deported from

---

[1] See 100 Cong. Rec. 736, 83rd Cong., 1st Sess.; *Analysis of the Social Security System,* Hearings before a Subcommittee on Ways and Means of the House of Representatives, 83rd Cong., 1st Sess., p. 129. The refusal of Congress to make either citizenship or residence preconditions for eligibility to receive social security benefits is in accord with the practice of most countries which employ a contributory system of social insurance. See id at 1554. For a defense of this principle as being the only consistent basis upon which such a program of insurance can be administered see the testimony of Arthur Altmeyer, the first chairman of the Social Security Board, id at 910-11.

[2] Most countries with contributory systems of social insurance pay benefits to non-resident aliens who have earned them. See fn. 1, supra.

the United States because of illegal entry, conviction of a crime, or subversive activity shall be terminated." (H. Rep. No. 1698, 83rd Cong., 2d Sess., p. 25).[3] And, as acknowledged by the appellant, certain causes of deportation were excluded from the statute "because Congress thought they did not involve serious derelictions" (J. S., p. 18, fn. 15).

Thus, what the statute actually does is to penalize appellee because he had been, according to an administrative finding, a member of the Communist Party years before the enactment of the deportation statute and of Section 202(n). This question, which is the one presented by the case, is not discussed or even adverted to by the appellant in his jurisdictional statement. We think it is clear that in several respects the statute is unconstitutional as applied.

(1) It violates Article III, Section 2, and the Sixth Amendment because it inflicts a penalty without judicial trial and solely as a result of an administrative determination. *Wong Wing* v. *United States*, 163 U.S. 228; and see dissenting opinion of Justice Jackson in *United States* v. *Spector*, 343 U.S. 169, 174.

(2) The statute is invalid as *ex post facto* legislation since it "inflicts punishment for a past act which was

[3] The Senate Report which originally rejected the provisions of 202(n) described it as follows (S. Rep. No. 1987, 83rd Cong., 2d Sess. to accompany H.R. 9366 at p. 23):

> "The House-approved bill would have required that no monthly benefits be paid on the basis of the wages and self-employment income of an individual who has been deported for specified causes. Your committee has not had an opportunity to give sufficient study to all the possible implications of this provision, which involves termination of benefit rights under the contributory program of old age and survivor's insurance, and has therefore deleted this provision from the bill."

not punishable at the time it was committed." See *Cummings* v. *Missouri*, 4 Wall. 277, 319; *Ex parte Garland*, 4 Wall. 333, 377.

(3) The statute is invalid as a bill of attainder since it is "a legislative act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, *supra* at 323.

(4) The deprivation of appellee's benefits violates due process because it has no reasonable relation to the purposes and objectives of the social security program. See *Nebbia* v. *New York*, 291 U.S. 502, 525. The social security program does not limit benefits to worthy characters, but permits receipt of benefits by individuals convicted of murder, robbery, larceny, fraud and other crimes.[4] Since the program does not entail moral character as one of the elements for eligibility, it is irrational to single out the group of which appellee is a member as a category to whom benefits shall be denied.

(5) The conduct for which petitioner has been penalized was mere past membership in the Communist Party with no element of participation in or knowledge of unlawful advocacy. This conduct was protected by the First Amendment. *Yates* v. *United States*, 354 U.S. 298; *American Communications Association* v. *Douds*, 339 U.S. 382. To deprive the appellee of benefits because of such conduct obviously violates the Amendment.

---

[4] The program does not take "into account his [the worker's] attitude, opinions, behavior or personal characteristics." See letter from Marion B. Folsom, former Secretary of Health, Education and Welfare, as set out in Hearings before the Committee on Finance of the United States Senate, 84th Cong., 2d Sess. on the Social Security Amendments for 1955, at p. 1319.

CONCLUSION

The decision below should be affirmed.

DAVID REIN
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Attorneys for Appellee

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FILED
JUN 5 1959
JAMES R. BROWNING, Clerk

No. [redacted] 54

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Acting Assistant Attorney General,
PHILIP R. MONAHAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 857

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

The motion to affirm asks the Court to affirm summarily, without the benefit of briefs on the merits or oral argument, the judgment of a single-judge District Court invalidating a significant provision of an Act of Congress affecting the nation's social security program. It invokes (Motion 4–5)[1] as reasons for such summary affirmance arguments which are unrelated to the articulated basis of the District Court's action, and which, though urged in the District Court, failed (so far as the opinion reflects) to win that

[1] "Motion" refers to the motion to affirm, and "J.S." to the jurisdictional statement.

court's acceptance.[2] Finally, it wholly fails to meet—indeed, does not mention—the issue on which the judgment below turned, *i.e.*, whether one who has commenced to receive monthly social security benefits acquires a vested or "property" right to the continued receipt of such benefits of such a nature that they may not be suspended upon the occurrence of an event (here, deportation) which Congress, by legislation of general applicability antedating the recipient's initial eligibility for such benefits, has provided shall result in such suspension. For these reasons, we submit, the motion to affirm should be denied.

1. As pointed out in the jurisdictional statement (J.S. 5, 8–9), the essence of the decision below was that appellee was denied due process in being deprived of what the court referred to as a "fully accrued" "property right"—the right to the continued receipt of social security benefits once they have been awarded—"through a legislative enactment which took such benefits because of deportation" (J.S., App. A, p. 41). The judgment in no way turned, as we further pointed out (J.S. 18), on the distinction which Section 202(n) of the Social Security Act makes between different classes of deportees. Yet appellee's motion to affirm rests on precisely this distinction and,

[2] The District Court set forth in its opinion, without comment, the substance of the arguments now relied on by appellee for summary affirmance (J.S., App. A, pp. 23–25). As we point out in the text, however, the court based its decision on other grounds, with no intimation that it thought there was any merit to the arguments now advanced by appellee as justifying the judgment.

as we have said, wholly fails to meet the issue on which the court's judgment was based.

2. Appellee argues that "what the statute actually does is to penalize appellee because he had been, according to an administrative finding, a member of the Communist Party years before the enactment of the deportation statute and of Section 202(n)" (Motion 4). But, as we have pointed out (J.S. 6–7, 18–19), the provision invalidated by the judgment below applies, with a few exceptions, to all deported aliens. Whether (as appellee argues) the categorization of deported persons which the statute creates is based upon a congressional purpose to "penalize" those to whom the suspension provisions apply, and whether such a purpose if present would invalidate the suspension provisions although they would be valid if generally applicable to all deportees, are questions which, we submit, warrant plenary consideration and should not be disposed of summarily on a motion to affirm.

The great power of Congress with respect to the admission and deportation of aliens is well settled. *E.g., Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587. Congress can validly create classes of aliens who shall be eligible to enter this country and classes which shall be excluded, and can likewise classify aliens in this country into those who shall be deported and those who shall be permitted to remain. Similarly, we perceive no constitutional barrier to Congress' appropriately classifying deported aliens into those who shall be permitted to continue to receive social security benefits which they have once begun to receive, and

those who shall have their benefits suspended upon deportation—once it is recognized (see J.S. 8–13) that Congress could constitutionally prohibit the payment of social security benefits to all deported aliens. To argue, as does appellee, that for Congress to declare as a matter of policy that certain categories of deported aliens, but not others, shall have their social security benefits suspended upon deportation is "penal" (and hence illicit) is no more sound than to argue that Congress cannot create classes of deportable aliens because the effect is to "penalize" such classes. The suspension of social security benefits need be no more "penal" in character than the act of deportation itself; and the non-penal nature of deportation is well settled. *Galvan* v. *Press*, 347 U.S. 522, 531.

For the foregoing reasons, it is respectfully submitted that the motion to affirm should be denied, and that probable jurisdiction should be noted.

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JUNE 1959.

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No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1959

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 54

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum opinion of the District Court (R. 24–46), holding Section 202(n) of the Social Security Act unconstitutional, is reported at 169 F. Supp. 922.

JURISDICTION

This suit was instituted under Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405 (g), to review a decision by the Secretary of Health, Education and Welfare, suspending the payment of monthly old-age benefits under Title II of the Social Security Act (42 U.S.C. 401–425) to a deported alien, as required by law (R. 1–2). The order of the Dis-

trict Court was entered on January 21, 1959 (R. 46–47), and amended on February 20, 1959 (R. 47–48). A notice of appeal to this Court was filed in the District Court on February 20, 1959 (R. 49–50). This Court, on June 22, 1959, entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 50). 360 U.S. 915.

The jurisdiction of this Court to review by direct appeal the decision entered in this cause is conferred, we believe, by 28 U.S.C. 1252; *Reid* v. *Covert*, 351 U.S. 487, 489; *Fleming* v. *Rhodes*, 331 U.S. 100, 102–104. See *infra*, pp. 19–28.

QUESTIONS PRESENTED

1. Whether a three-judge court was required to be convened to consider the relief prayed for in appellee's complaint.

2. Whether an alien who has been awarded and has commenced to receive monthly social security benefits under Title II of the Social Security Act (42 U.S.C. 401–425) has a vested or "property" right to the continued receipt of such benefits, of such a nature that their suspension pursuant to statutory direction, following his deportation, deprives him of property without due process of law, where the statute commanding the suspension—Section 202(n) of the Social Security Act, as amended, 42 U.S.C., Supp. V, 402(n), providing that no monthly social security benefit shall be paid to any person who has been deported under any of various designated paragraphs of Section 241(a) of the Immigration and

Nationality Act, 8 U.S.C. 1251(a), until his lawful readmittance to the United States for permanent resident—was enacted prior to the date on which the alien first became eligible for any social security benefits.

STATUTES INVOLVED

The following provisions of the Social Security Act are involved herein, and are set forth in Appendix A, *infra*, pp. 89–93: Section 202(a), as amended, 42 U.S.C., Supp. V, 402(a) [old-age insurance benefits]; Section 205(g), as amended, 42 U.S.C. 405(g) [the statutory review provision]; Section 202(n), 42 U.S.C., Supp. V, 402(n) [the provision for suspension of benefits upon deportation]; and Section 1104, 42 U.S.C. 1304 [the reservation of right to amend or repeal].

In addition, Section 202(t) of the Social Security Act, as amended, 42 U.S.C., Supp. V, 402(t) [the provision for suspension of benefits of nonresident aliens], and Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. 1251(a) [the deportation provision], are also reprinted for the convenience of the Court in Appendix A, *infra*, pp. 93–103.

STATEMENT

Appellee is an alien who came to the United States from Bulgaria, and who was deported to his native country on July 7, 1956, pursuant to paragraph (6)(C)(i) of Section 241(a) of the Immigration and Nationality Act (Appendix A, *infra*, p. 97), as an alien who had been after entry a member of

the Communist Party of the United States (R. 1, 20–22).[1]

Appellee became entitled to apply for social security benefits in November 1955, by virtue of having attained age 65 (R. 7). He filed an application for old-age benefits on December 2, 1955 (R. 8, 15), and received an award in the monthly sum of $55.60, effective as of November 1955 (R. 8, 15).

On August 31, 1956, subsequent to appellee's deportation, the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, Department of Health, Education and Welfare ("the Bureau"), was notified by the Attorney General, as required by paragraph (2) of Section 202(n) of the Social Security Act (Appendix A, *infra*, p. 92), that appellee had been deported (R. 8). The Bureau, under the mandatory provisions of paragraph (1) of Section 202(n) (Appendix A, *infra*, pp. 91–92), suspended (with appropriate notice to the Secretary of the Treasury) payment of appellee's old-age benefits effective as of September 1956

[1] The opinion below (R. 24) states that appellee's deportation was effected pursuant to "paragraph (1)" of Section 241(a) of the Immigration and Nationality Act. The correct statutory designation is, however, as indicated in the text, paragraph (6)(C)(i) of Section 241(a). The reference in the opinion below apparently originated from a mistaken reference in the social security administrative record (repeated in appellant's memorandum in opposition to appellee's motion for summary judgment), to "paragraph (1) of Section 241(a)," as the statutory basis of appellee's deportation (R. 14).

(R. 9).[2] Notice of the suspension was given to appellee's wife (R. 9).

On February 26, 1957, appellee appointed his wife and an attorney as his representatives in an effort to have old-age benefit payments reinstated and paid to him in Sofia, Bulgaria (R. 9), and on the same day (Tr. 21),[3] he filed a request for a hearing with the Social Security Administration (R. 9). Pursuant to Section 205(b) of the Social Security Act (42 U.S.C., Supp. V, 405(b)), a hearing was held before a referee of the Office of Appeals Council in the Social Security Administration on December 30, 1957 (R. 11–12). On January 31, 1958, the referee sustained the Bureau's action suspending the payments of benefits (R. 7–10). Thereafter, appellee requested a review of the referee's decision by the Appeals Council and on March 13, 1958, the Appeals Council informed appellee that his request was denied (R. 5–6).[4] On May 5, 1958, appellee instituted this action in the United States District Court for the District of Columbia (R. 1–2), seeking statutory review of the administrative decision pursuant to Section 205(g) of

[2] Appellee had been paid all benefits for the months of November 1955 through the month of August 1956. By inadvertence, he was also paid the benefit for the month of September 1956 (R. 9).

[3] "Tr." refers to the Transcript of the Record.

[4] Under the applicable regulations, 20 C.F.R. 403.710(b) and 404.901, the Council has discretionary power to grant or deny a request for a review of a decision rendered by one of its referees. Also under the applicable regulations, 20 C.F.R. 403.710(e), the effect of such a denial is to constitute the referee's decision a "final decision of the Secretary" within the meaning of Section 205(g) of the Social Security Act (Appendix A, *infra*, p. 89).

the Social Security Act (42 U.S.C. 405(g)). The complaint alleged that the action of the appellant in suspending the benefit payments to the appellee, "pursuant to the provisions of section 202(n) of the Social Security Act," was illegal and unconstitutional (R. 2). On January 21, 1959, on motion by appellee and cross motion by appellant for summary judgment (R. 19, 23), appellee's motion was granted (R. 46–47). On February 20, 1959, the order of the District Court granting appellee's motion was, with the consent of counsel for appellee, amended in a respect not pertinent here (R. 47–48).

The court held that Section 202(n), as here applied, is repugnant to the Due Process Clause of the Fifth Amendment, because it deprived appellee of a "property right" which had "fully accrued" to him (R. 40). In summary, it said (*ibid.*):

> This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits because of deportation. * * *

SUMMARY OF ARGUMENT

I

The jurisdictional problem is whether the case should have been heard by a three-judge district court under 28 U.S.C. 2282, requiring such a court for the granting of injunctions restraining the enforcement, operation, or execution of Acts of Congress on account of repugnance to the Constitution. Appellee's complaint for statutory review was brought

under and invoked the jurisdiction of the district court under Section 205(g) (Appendix A, *infra*, pp. 89–91), the statutory review provision of the Social Security Act, which calls for a "civil action" to "review" the administrative decision, and in which the district court is to affirm, modify, or reverse that decision. The gist of the proceeding is the "review" of the administrative determination, and the judicial review thus authorized extends to every legal question which the claimant is entitled to raise, including constitutional issues; it is not limited to questions of statutory construction, sufficiency of evidence, and regularity of procedure. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345–346; *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 135, 137–138.

In our view, the special statutory review procedure provided by Section 205(g) furnishes the exclusive remedy with respect to determinations under the Social Security Act. There is no doubt that in a proper case a single-judge district court can pass upon the validity of Congressional legislation in a suit to which 28 U.S.C. 2282 does not apply. See *e.g.*, *Reid* v. *Covert*, 351 U.S. 487, overruled on the merits on reargument, 354 U.S. 1; *Woods* v. *Miller Co.*, 333 U.S. 138; *Fleming* v. *Rhodes*, 331 U.S. 100. There are no impelling reasons why a Section 205(g) review should not likewise be treated as a suit to which the three-judge court provision of 28 U.S.C. 2282 is inapplicable. The "review" aspect of the appellee's action was primary, and the injunctive effect of the district court's judgment was wholly secondary.

Moreover, appellee's complaint for statutory review did not in terms request injunctive relief against the enforcement of the challenged statute. It is the request for such relief, not merely that the validity of an Act of Congress is drawn in question, which makes appropriate and necessary the convocation of a three-judge court. *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243, 250. Appellee's complaint should not be regarded as an application for injunctive relief in the usual sense of a suit to enjoin the taking of future action feared or threatened, which will cause irreparable harm incapable of compensation. Cf. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977.

We urge, therefore, that the single-judge district court had jurisdiction to hear and decide this case. Because the decision below was against the validity of a Congressional enactment, the direct appeal provision of 28 U.S.C. 1252 applies. See *Reid* v. *Covert, supra; Fleming* v. *Rhodes, supra.*

II

The history and general purposes of the federal social security legislation require no detailed recitation. See *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 588–599; *Helvering* v. *Davis*, 301 U.S. 619, 640–645. To facilitate understanding, we set forth at the outset the relevant provisions of the present Old-Age and Survivors Insurance (OASI) program, which has undergone fundamental changes since its original enactment.

A. 1. The basic condition for becoming eligible for OASI benefits by an individual, for himself and for

members of his immediate family, is that of having worked in specified types of employment and self-employment ("covered employment") in the United States and its principal possessions. Whether the "covered" individual (and members of his family) will eventually qualify for benefits depends upon his satisfying a number of additional eligibility conditions, of which an essential one is that the individual must have earned a specified minimum amount of income during a qualifying length of time. At the present time, earnings in "covered" employment up to $4800 per year are taxable for social security purposes.

2. Eligibility for OASI benefits is based upon someone's earnings record, not, as is often assumed, upon payment of taxes. The amount of work required for eligibility is measured in "quarters of coverage." For most kinds of employment, an employee receives credit for one quarter of coverage for each calendar quarter in which he was paid $50 or more in wages. The number of quarters of coverage are used only to ascertain whether an individual has attained an "insured" status. This criterion does not determine the amount of payments, which is calculated on the basis of "average earnings."

3. To be eligible for primary or supplementary benefits, a man must have reached age 65, and a woman age 62.

4. The "work test" requires retirement as a condition of eligibility for payment of OASI benefits. Individuals who have retired and who have not

reached age 72 are subject to having their monthly benefit payments reduced if they earn wages in excess of $1,200 a year, or if they render "substantial services" in self-employment.

B. 1. The OASI program is in no sense a federally-administered "insurance program" under which each worker pays "premiums" over the years and acquires at retirement an indefeasible right to receive for life a fixed monthly benefit, irrespective of the conditions which Congress has chosen to impose from time to time. While the Act uses the term "insurance," the true nature of the program is to be determined from its actual incidents.

The "contributions" exacted under the social security program from an employee in covered employment, in the form of payroll deductions made by the employer on behalf of the Government and paid into the general Treasury, is a *tax*. *Helvering* v. *Davis*, 301 U.S. 619, 635. Likewise, the employer's contribution is an *excise tax* levied on his employees' payrolls. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583. Both taxing provisions are contained in the Internal Revenue Code. 26 U.S.C., Supp. V, 3101 and 3111.

2. The "Trust Fund" from which OASI benefits are paid is maintained by annual appropriations made by Congress out of money in the Treasury not otherwise appropriated. Unlike private life insurance companies, which essentially require reserves equal to the present value of all benefits, the social security program needs no such reserves since it is assured of continuing participation by the exaction of taxes. The Trust Fund is, therefore, more in the

nature of a contingency fund, and serves to facilitate the fiscal policies of Congress. The beneficiary or prospective beneficiary of the OASI program acquires no interest in the fund itself.

C. The original Social Security Act did not differentiate betweeen beneficiaries of the program who were citizens and those who were aliens, or whether alien beneficiaries resided in or outside the United States. As early as 1939, Congress contemplated restrictions on payment to alien beneficiaries, but no outright changes were made in the program in this respect until 1954. Congressional inquiry into the operation of the program in connection with the 1954 Amendments disclosed that OASI benefits paid to recipients living outside the United States had increased at a more rapid rate than benefits paid to residents of the United States. An alien coming to this country at an advanced age could, after working in "covered" employment for as little as a year and a half, become eligible for the maximum OASI benefits. If, after having become entitled to benefits, such alien were to leave the country, he would not only continue to draw his social security check from the United States, but if he married and had children, his wife as well as his minor children would be eligible for benefits notwithstanding the fact that none of his family had ever resided in the United States. The Congressional inquiry raised serious doubts whether these aspects of the OASI program accorded with the fundamental objective of the program, which was to provide "protection against economic insecurity for the American people."

On the basis of the hearings, several amendments were proposed to the 1954 Social Security Amendments, one of which became Section 202(n)—the section in issue in this case—which provides for suspension of OASI benefit payments to certain deportees. Another amendment applied for the first time a modified "work test" to beneficiaries (regardless of citizenship) who were earning income abroad; until then, income earned abroad had no effect upon a person's monthly retirement benefits.

Subsequently, in 1956, Congress continued its policy by providing that aliens who voluntarily absent themselves from the United States for longer than six months should, with certain exceptions, have their benefit payments abroad suspended pending their return. Section 202(t). This was in keeping with the newly established policy that welfare payments be restricted as far as practicable to citizens and alien residents of the United States. Under the amended program, the physical presence of an alien beneficiary in this country is most often of dominant importance to his continued receipt of OASI benefits.

III

The essence of the decision below was that appellee was denied due process in being deprived of what the court referred to as a "fully accrued" "property right"—the right to the continued receipt of social security benefits once they have been awarded—"through a legislative enactment which took such benefits because of deportation" (R. 40). We believe that this view of the district court is clearly erroneous.

A. 1. This Court has had frequent occasion to point out the difference between insurance and annuity programs which create property rights, and pensions. *United States* v. *Cook*, 257 U.S. 523; *Pennie* v. *Reis*, 132 U.S. 464. "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." *Lynch* v. *United States*, 292 U.S. 571, 577.

2. Similarly, state and territorial legislation establishing retirement or pension plans for employees of the various branches of government—frequently providing for compulsory employee contributions to the retirement fund—has been usually interpreted as not creating any vested rights.

B. Under these general principles, consistently accepted by this Court, the right to federal social security benefits is a statutory, conditional right, which the possessor enjoys subject to all the conditions which Congress has attached and may attach. See *Ewing* v. *Risher*, 176 F. 2d 641, 644 (C.A. 10).

1. The non-vested and non-contractual character of the benefits is plainly shown by the statutory scheme, as we have pointed out (*supra*, pp. 8–11). Benefits are computed individually in each case on the basis of average earnings in "covered" employment over a specified amount of time. That there is no correlation between the taxes paid and the amount of benefits which may become payable is well exemplified by the "work test" clause, *supra*; by the "wage credit" which was af-

forded to servicemen for periods of active duty, although no taxes had been collected; and by the fact that the benefits payable in the early years of the OASI program are far in excess of the benefits that would be payable if the employee's "contributions" had been used to purchase an "annuity" under a private policy of insurance. Consistent with the non-contractual nature of OASI benefits is the ruling of the Internal Revenue Service that OASI benefits are not taxable, since they are gifts.

Moreover, since the inception of the program, Congress has retained the "right to alter, amend, or repeal any provision" of the Social Security Act. Section 1104. No contractual obligation on the part of the Government and no contractual right of a beneficiary could coexist with this reservation of power.

It would have been within Congress' power to suspend appellee's benefits by legislation enacted *after* he became eligible for, or commenced to receive, monthly benefits. In fact, however, Section 202(n) antedated appellee's initial qualifying for OASI benefits by fourteen months. Thus, at the time appellee first became eligible to receive (and commenced to receive) benefits, the statutory provision pursuant to which they were later suspended was already on the books, and he took his benefits subject to their later suspension upon the happening of the conditions which Congress had imposed.

2. Constitutional challenges to other provisions of the Social Security Act which reduced or withheld benefits from individuals who (unlike appellee) had

fully qualified for and were awarded such benefits *prior* to the enactment of the provision in question have been rejected by the lower federal courts. *Price* v. *Folsom*, 168 F. Supp. 392 (D.N.J.): *Mullowney* v. *Folsom*, 156 F. Supp. 34 (E.D.N.Y.).

3. The court below placed considerable reliance on the decision of the Court of Claims in *Steinberg* v. *United States*, 163 F. Supp. 590. That case is clearly inapposite. *Steinberg* involved an annuity under the Civil Service Retirement Act, financed by genuine contributions of the employees. The retirement benefits there were held to be part of the inducement for remaining in government service. More importantly, Steinberg's annuity was suspended because he had availed himself of his constitutional right against self-incrimination; appellee's benefits were suspended as a consequence of his deportation under a concededly valid statute following proper proceedings.

4. In summary, the social security program must be viewed as a welfare instrument to which common law property concepts are inapposite. Public action involving compulsion is invoked to deal with a social problem, *viz.*, the lack of basic economic security of large segments of our society. The court below erred in applying "vested rights" theory to this case. Rather, as we have shown, the OASI beneficiary has a statutory "right", contingent upon the continued existence of the law which created it. The only restraint which the Constitution places upon subsequent amendatory legislation is that it be not arbitrary or unduly discriminatory.

IV

Appellee argues that Section 202(n) irrationally singles out a limited group for suspension of benefits, and further, as applied to him, that the Section penalizes him for having been a member of the Communist Party.

A. 1. Appellee is an alien—now a nonresident alien—and Congress can constitutionally take that into account in the social security program. Alienage has been traditionally recognized as a valid basis for the classification of individuals in law. The sole question is whether the distinction based on alienage, particularly nonresident alienage, has a reasonable relation to the purposes of the legislation. *Truax* v. *Raich*, 239 U.S. 33, 42. Reasons for separate treatment of aliens in the social security program readily suggest themselves. The function which OASI was designed to serve was primarily to promote the "general welfare" of the residents of *this* country. *Helvering* v. *Davis*, 301 U.S. 619, 640. It cannot be said that a claimant's citizenship or residency is irrelevant to that objective.

2. Not all deported aliens are subject to the suspension of OASI benefits by virtue of Section 202(n). Of the eighteen grounds for deportation enumerated in Section 241(a) of the Immigration and Nationality Act, fourteen are cited in Section 202(n); four classes are excluded. It will be readily seen, however, that Section 202(n) covers the vast majority of causes of deportation and of deportees. Even though the district court's judgment in no way turned on the distinction which Section 202(n) draws between dif-

ferent classes of deportees, there are reasonable grounds for the exceptions.

3. In any event, the fact that Congress has chosen not to bring within the purview of Section 202(n) *all* classes of deportees does not vitiate the legislation. As Mr. Justice Holmes said, "a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see." *Keokee Coke Co.* v. *Taylor,* 234 U.S. 224, 227. And in *United States* v. *Petrillo,* 332 U.S. 1, 8, this Court noted: "[I]t is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power."

4. Since Congress could, consistently with the purposes of the social security program, suspend the payments of OASI benefits to all aliens who are absent from the United States, it could validly pursue that policy by initially suspending OASI benefits to deportees alone. The fact that a limited number of deportees was not at first embraced by the policy, does not make such legislation unreasonable and arbitrary. (The four classes of deportees excluded from the operation of Section 202(n), are now subject to suspension of OASI benefits to the same extent as are aliens who voluntarily leave the United States. See Section 202(t)).

B. In an attempt to create a further constitutional infirmity, appellee suggests that Section 202(n) is

invalid as a bill of attainer and as *ex post facto* legislation.

1. In recent years, the Court has had several occasions to canvass the concept of "punishment" in the constitutional sense. The principle which has emerged is that civil regulations based on past conduct, even though the regulation is "harmful" to the individual, are not invalid, or transformed into punitive sanctions, where they represent an exercise of regulatory power to accomplish a non-penal purpose, and are not designed to inflict punishment.

2. The suspension of appellee's OASI benefits undoubtedly operates to his detriment; but, as we have pointed out, Congress has consistently over the years made changes in the social security program which it deemed in the interest of the social welfare of this country. In most instances, it was to the advantage of present or prospective beneficiaries; sometimes, however, the changes have worked to the disadvantage of particular groups. Suspension of OASI benefits does not in itself constitute "punishment"; the law simply defines new conditions for qualification—conditions which are validly related to the ultimate object of the legislation.

The legislative scheme embodied in Section 202(n) proceeds on this principle. The antecedent factors which lead to an alien's deportation are not of direct relevance to the social security program. What is of utmost relevance to the program, however, is an alien's presence in, or absence from, this country. It is the living abroad which is the dominant factor, not punishment or retribution for past conduct.

Congress itself distinguishes between suspension of OASI benefits in furtherance of the social security program, on the one hand, and suspending such benefits for punitive purposes on the other. This is exemplified by the 1956 amendment of Section 202(u) which gives a federal court discretionary power to terminate OASI benefits of certain offenders, where such benefits are based on the employment records for the period in which the conviction occurs or for any prior period.

3. Our argument that Section 202(n) does not impose punishment equally disposes of the contention that it constitutes *ex post facto* legislation. The latter argument is but a spurious attempt by appellee to challenge the constitutional validity of his deportation. Appellee did not seek judicial review of his deportation order, and the validity of the grounds for his deportation is established. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593; *Galvan* v. *Press*, 347 U.S. 522, 531.

ARGUMENT

I. NO THREE-JUDGE COURT WAS REQUIRED TO BE CONVENED, PURSUANT TO 28 U.S.C. 2282, TO GRANT THE RELIEF PRAYED FOR IN APPELLEE'S COMPLAINT. THE DISTRICT COURT'S JUDGMENT HAVING INVALIDATED AN ACT OF CONGRESS, DIRECT APPEAL LIES TO THIS COURT UNDER 28 U.S.C. 1252 [8]

The jurisdictional problem is whether the case should have been heard by a three-judge district

[8] The Court's order of June 22, 1959, postponed consideration of the question of jurisdiction to the hearing on the merits (R. 50). 360 U.S. 915. Pursuant to Rule 16(4) of this Court's Revised Rules, we address ourselves at the outset of this brief to the question of jurisdiction.

court under 28 U.S.C. 2282, requiring such a court for the granting of any "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution * * *." Neither party in the court below requested a three-judge court, and none was convened. If the case should have been heard and decided by such a court, the single-judge district court below was without jurisdiction, and this Court should reverse its judgment and remand the case for consideration by a three-judge court. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977. However, although the question is not wholly free of doubt, we believe that the convocation of a three-judge court was unnecessary, and that the court below had full jurisdiction under the special statutory proceeding for review of social security rulings.

A. Appellee's complaint, entitled "Complaint for Statutory Review" (R. 1), was brought under and invoked the jurisdiction of the district court under Section 205(g), the special statutory review provision of the Social Security Act (42 U.S.C. 405(g)); Appendix A, *infra*, pp. 89–91.

Section 205(g) provides in pertinent part:

> Any individual, after any final decision of the Secretary [of Health, Education, and Welfare] made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action * * * brought in [an appropriate] district court * * *. * * * The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision

> of the Secretary, with or without remanding the cause for a rehearing. * * *

This special statutory procedure is for a "civil action" to "review" the administrative decision, in which the court is to affirm, modify, or reverse that decision. The gist of the proceeding is the "review" of the administrative determination.

The appellee alleged under paragraph (6) of his complaint (R. 1) that appellant, "acting through his subordinates, and pursuant to the provisions of section 202(n) of the Social Security Act * * *, suspended payment of plaintiff's old-age insurance benefits from and after September, 1956." Under paragraph (9) of his complaint, appellee averred that "the action of the defendant suspending the benefit payments to the plaintiff was illegal and unconstitutional", predicating his claim on various constitutional provisions (R. 2). The prayer of the complaint (R. 2) sought the court to adjudge "that the suspension of said benefit payments is illegal and unconstitutional and order the defendant to withdraw his order suspending the payment of benefits to the plaintiff, to pay plaintiff accrued benefits as may be due him, plus interest * * *," and further relief.

H. Rept. No. 728, 76th Cong., 1st Sess., p. 43, in discussing the proposed new section in the Social Security Act Amendments of 1939 which ultimately became the statutory review provision, *supra*, stated:

> Section 205(g) provides that any individual may obtain a review of any final decision of the [Social Security] Board made after a hear-

> ing to which he was a party, by commencing a civil action in the appropriate district court of the United States within 60 days after notice of the decision is mailed to him. The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board. The provisions of this subsection are similar to those made for the review of decisions of many administrative bodies. The Board's decisions on questions of law will be reviewable, but its findings of fact, if supported by substantial evidence, will be conclusive. * * *

The identical language is found in the report of the Committee on Finance of the Senate, with reference to this amendment, S. Rept. 734, 76th Cong., 1st Sess., p. 52.

Under decisions dealing with similar statutory review provisions, it has been held that the judicial review thus authorized extends to every legal question which the claimant is entitled to raise, including constitutional issues, and is not limited to questions of statutory construction, sufficiency of evidence, and regularity of procedure. This Court's decision in *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, is particularly instructive. That case involved an administrative procedure established by the Internal Revenue Act of 1936 respecting the refunding of processing taxes collected under the Agricultural Adjustment Act of 1933 (the latter having been declared unconstitutional). The opinion of the Court, after outlining the procedure before a Board of Review in the

Treasury Department and the direct review in a court of appeals, stated (pp. 345–346):

> We think that this plan of procedure provides for the judicial determination of every question of law which the claimant is entitled to raise. We find nothing in the statute which limits the judicial review to questions of statutory construction or of mere regularity of procedure. The "law," with which the decision of the Board may be in conflict, may be the fundamental law. Questions of validity as well as of statutory authority or regularity may be determined. These may relate to due process in the hearing or in the refusal of a refund. * * * The Government recognizes and urges that the jurisdiction given to the Court of Appeals "to modify or reverse" the decision of the Board "if it is not in accordance with law" includes the power to review all questions of general and statutory law and all constitutional questions. Thus every constitutional right which the petitioner here is entitled to invoke with respect to the refund of the taxes which it has paid may be heard and determined by the Court of Appeals and ultimately by this Court upon a review of a decision reached in the course of the prescribed administrative procedure. * * *

Although, as is indicated in this quotation, the judicial review provision there involved gave the appropriate court the authority to affirm, modify, or reverse the administrative decision *"if it is not in accordance with law,* with or without remanding the cause for a rehearing, *as justice may require"* (*Anniston,* at p. 345; the language in italics is not found

in Section 205(g) here in issue), we believe this language to be merely declaratory and to be implicit in the statutory review provision of the Social Security Act. It requires no demonstration that it is always the function of a reviewing court to ascertain whether the determination which it is called upon to scrutinize is "in accordance with law."

Similarly, in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, where the State of Oklahoma, pursuant to Section 12(c) of the Hatch Act, instituted proceedings in a federal district court to review a determination of the Civil Service Commission, this Court held:

> The issue is whether Oklahoma can challenge the constitutionality of § 12 on statutory review of a Commission order. Subsection (c) gives to any party aggrieved a judicial review of the Commission order. The review is on the entire record and extends to questions of fact and questions of law. The order is to be affirmed if the court determines that it is "in accordance with law." * * * We think the challenge can be made in these review proceedings to the constitutionality of the law upon which the order under review is predicated. [330 U.S. at p. 135.]
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> * * * When it brought this suit, under this statutory authority, Oklahoma was entitled to a judicial determination as to whether the order of the Civil Service Commission was "in accordance with Law." Was the order within the competency of the Commission? That question of competency included the issue

> of the constitutionality of the basis for the order, § 12(a). Only if the statutory basis for an order is within constitutional limits can it be said that the resulting order is legal. To determine that question, the statutory review must include the power to determine the constitutionality of § 12(a). [330 U.S. at pp. 137–138.]

In our view, the special statutory review procedure provided for by Section 205(g) furnishes the exclusive remedy with respect to determinations under the Social Security Act (including constitutional challenges), rendering the three-judge provision of 28 U.S.C. 2282 as inapplicable as would be the provisions of the Declaratory Judgment Act. Cf. *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 243; see also *Lee* v. *Roseberry*, 94 F. Supp. 324, 327 (E.D. Ky.). This statutory "civil action" for "review" by the district court is, as we have pointed out, fully adequate and available to consider all issues raised on review of the administrative ruling, just as was the comparable statutory proceeding under the Hatch Act in the *Oklahoma* case, *supra*.

There is no doubt that a single-judge court can pass upon the validity of an Act of Congress in a suit to which 28 U.S.C. 2282 does not apply. See, *e.g.*, *Reid* v. *Covert*, 351 U.S. 487, overruled on the merits on reargument, 354 U.S. 1 (habeas corpus proceeding); *Woods* v. *Miller Co.*, 333 U.S. 138 (suit by the Government); *Fleming* v. *Rhodes*, 331 U.S. 100 (the same); and *infra*, pp. 26–27. There are no impelling reasons, we believe, why Section 205(g) should not likewise be treated as a suit to which 28 U.S.C. 2282

is inapplicable. The "review" aspect of the appellee's action was primary, and the injunctive effect of the district court's judgment was wholly secondary. Such a construction would accord with the tendency to strict construction of three-judge court provisions. Cf. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368; *Phillips* v. *United States*, 312 U.S. 246.

B. Moreover, appellee's complaint for statutory review did not in terms request injunctive relief against the enforcement of the challenged statute. It is the request for such relief, as this Court has held, which makes appropriate and necessary the convocation of a three-judge court. In *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243, 250, the Court observed:

> Section 3 [of the Act of August 24, 1937, 50 Stat. 752, the precursor of present Section 2282 of Title 28 U.S.C.] does *not* provide for a case where the validity of an Act of Congress is *merely drawn in question, albeit that question can be decided*, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress. * * * Had Congress intended the provision in § 3 * * * to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase "drawn in question," * * *. [Emphasis added.]

It is not even sufficient that a party apply for an interlocutory or permanent injunction if the constitutional claim upon which it is grounded is in fact frivolous. *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171. And, since a statutory three-judge court

proceeding is basically injunctive in nature, the bill must state a cause of action which traditionally has called for the decreeing of injunctive relief. *Federal Housing Administration* v. *The Darlington, Inc., supra,* 352 U.S. 977. These cases are illustrative of the doctrine enunciated in the *Garment Workers* case, *supra,* that it is not the long-range effect of a court's decision, but the pleadings and the remedy sought by the plaintiff which determine the question whether a three-judge court must be convoked.

The appellee's complaint should not be regarded as an application for injunctive relief in the light of these principles. There is no sufficient showing of future action threatened or feared.[6] The administrative order suspending payment of benefits had already been entered at the time of the filing of the complaint, and had in fact been outstanding for some eight months when the complaint was filed (*supra,* pp. 4–5). Basically, the complaint sought a "review" of the administrative decision, and asked for an order requiring the Secretary to withdraw the suspension of benefits and to pay "accrued" and future benefits (R. 2).

[6] Such was the case in *Federal Housing Administration* v. *The Darlington, Inc., supra,* 352 U.S. 977, where the F.H.A. threatened to take certain action on the basis of a newly enacted statute. The damages which the complainant might suffer could not be expressed in monetary terms. The Darlington, Inc., in its complaint, asked for a declaratory judgment stating the respective rights of the parties, for an order enjoining the F.H.A. from interfering with its housing operation, and for a preliminary injunction. Appellant's Jurisdictional Statement, No. 599, October Term 1956, p. 11.

C. We conclude, therefore, that the single-judge district court had jurisdiction to hear and decide this case. Because of the outcome below, the direct appeal provisions of 28 U.S.C. 1252 apply, under which—

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies * * * is a party.

See *Reid* v. *Covert, supra,* 351 U.S. 487; *Fleming* v. *Rhodes, supra,* 331 U.S. 100.

II. THE CONGRESSIONAL PLAN OF OLD-AGE AND SURVIVORS INSURANCE BENEFITS

The history and general purposes of the federal social security legislation are well known and require no detailed reiteration. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 588–599; *Helvering* v. *Davis,* 301 U.S. 619, 640–645; *Social Security Board* v. *Nierotko,* 327 U.S. 358, 364.

The basic idea of old-age, survivors, and disability insurance benefits is a simple one. During their employment or self-employment, employees (and their employers) and self-employed persons pay taxes based on the wages from their employment or their self-employment income as defined in the statute. The tax collections go into the Treasury as internal-revenue collections. Equivalent amounts go to two trust funds (one of which is for disability payments), by virtue of a standing annual appropriation by Congress "out

of any moneys in the Treasury not otherwise appropriated." Section 201(a), 42 U.S.C., Supp. V, 401(a). When the worker has retired, either because of old age or because of disability after attaining age 50, or has died, benefit payments are made to replace part of the earnings which he and his dependents or survivors have lost.

Throughout the period of its existence, however, the program (which did not cover cases of disability until recently) has undergone fundamental changes. For the convenience of the Court, we epitomize in this Point, so far as relevant to the issues in this case, the major provisions of the present Old-Age and Survivors Insurance (OASI) program as contained in Title II of the Social Security Act. Act of August 14, 1935, c. 531, Title II, 49 Stat. 620, as amended, 42 U.S.C. 401–425.[1]

A. CONDITIONS OF ELIGIBILITY

Beside a small lump-sum death payment, benefits fall into two main categories:

Primary benefits—those payable to the so-called "wage earner" (the individual on whose record of earnings from wages, self-employment income, or both, benefit payments are based), consisting of old-age insurance (and disability insurance) benefits.

Secondary benefits—those payable to others than the wage earner, but on his earnings record; they con-

[1] Although, as stated, the program also includes disability provisions, and is at times referred to as Old-Age, Survivors and Disability Insurance (OASDI), we avoid detailed discussion of the disability aspect of the program in this brief, since it is in no way drawn into issue here.

sist of auxiliary benefits (payable to specified dependents of a living wage earner) and survivors benefits (payable to specified dependents of a deceased wage earner).

To become initially entitled to old-age insurance benefits, certain statutory conditions of entitlement must be met. These include (1) an appropriate record of earnings from covered employment or self-employment; (2) a minimum number of quarters of coverage based on such earnings (the minimum number of quarters depending under the statute, in general, on the individual's age at the time he commences and stops working); (3) an age requirement; (4) the filing of an application; and (5) in the case of disability insurance benefits, a disability as defined by the statute. To be eligible for auxiliary or survivor's benefits, there must also be established a specified close family relationship to the wage earner.

1. *Coverage.* A basic condition of eligibility for old-age, survivors, and disability insurance benefits of a wage earner or any dependent is that the wage earner have worked in, and have had income from, specified types of employment or self-employment, or both, in the United States and its principal possessions (and outside the United States under certain conditions). When any person is engaged in such employment or self-employment, and is receiving wages or self-employment income therefrom as defined by the Act, he is building up an earnings record toward eligibility for Title II benefits. Whether he and members of his family will eventually qualify is dependent upon satisfying a number of additional eligi-

bility conditions, of which an essential one is that the individual must have received a specified amount of such wages or income during the qualifying length of time in employment or self-employment covered by the program.

Under the original 1935 Social Security Act, when Title II was known as Federal Old-Age Benefits (49 Stat. 622), coverage under the Act was limited to private employment in the United States. Certain types of employment, such as agricultural labor, domestic service, maritime employment, service in the employ of the United States Government or of State and local governmental units, employment of individuals aged 65 and over, etc., were excluded from the coverage of the program (49 Stat. 625). For a detailed discussion see *Social Security After 18 Years*, A Staff Report for the Committee on Ways and Means, House of Representatives, 83rd Cong., 2nd Sess., p. 28 (*"Staff Report"*).

In 1939, when the Social Security Act was largely rewritten and the old-age benefits system became the Federal Old-Age and Survivors Insurance Benefits (53 Stat. 1362), coverage was expanded in some respects and clarified and restricted in other respects. Principally, employed persons aged 65 and over, and persons performing maritime services on American vessels, were brought within the purview of the program (53 Stat. 1373–1374). *Ibid.*

During the ensuing 11 years there were no outright OASI coverage extensions (although wage credit

rights were granted to war veterans in the manner described *infra*, p. 60). In the Social Security Act Amendments of 1950 certain major occupational groups—agricultural and domestic workers, some employees of the Federal government, certain self-employed persons, as well as employees of certain eleemosynary organizations (the latter on an optional basis)—were brought into the program (64 Stat. 494–504). Provision was also made for Federal–State agreements to cover employees of State and local governments. *Staff Report, supra*, pp. 28–29.

Subsequent amendments in 1954, 1956 and 1958[8] further extended social security to self-employed farm operators, self-employed professionals, ministers (on an individual elective basis), State and municipal government employees already covered by a local retirement plan (by Federal-State agreement), and a miscellany of jobs, including fishing and related activities, homeworkers, American citizens employed abroad by American-owned subsidiaries incorporated in foreign countries, etc. *Staff Report, supra*, p. 30.

In spite of the vastly expanded coverage under the current Social Security Act, certain types of income do not meet the coverage conditions of eligibility.[9]

[8] Social Security Amendments of 1954, 68 Stat. 1052, 1061; Social Security Amendments of 1956, 70 Stat. 824–828; Social Security Amendments of 1958, 72 Stat. 1035, 1040.

[9] For example, investment income such as dividends and interest (unless received by a dealer in stocks and securities) (Section 211(a)(2), 42 U.S.C., Supp. V, 411(a)(2)), rentals from real estate (unless received by a real estate dealer) (Section 211(g)(1), 42 U.S.C., Supp. V, 411 (a)(1)), and gains from the sale or exchange of capital assets are not acceptable for OASI coverage purposes (Section 211(a)(3), 42 U.S.C., Supp.

Income of an individual in excess of $4,800 a year is not taxable for Title II purposes (Section 209(a)(3), 42 U.S.C.A., 1958 Pocket Part, 409(a)(3))—except where he may have been employed by two or more employers in a year, in which case the employee (but not the employer), is entitled to a refund for the excess amount of taxes.

2. *The Earnings Record.* Eligibility for benefits is based upon someone's earnings record, not, as is often assumed, upon payment of taxes.[9] Primary old-age benefits are based upon the individual's own earnings record. The earnings record of the individual also provides the basis for eligibility for benefits of his dependents and survivors (auxiliary or survivor's benefits).

V, 411(a)(3)). Hence, individuals whose income may be derived entirely from such sources cannot thereby acquire eligibility for OASI benefits. Self-employment income is not creditable if it amounts to less than $400 in a taxable year for an individual (Section 211(b)(2), 42 U.S.C. 411(b)(2)). But if an individual has both taxable wage income and self-employment income, the self-employment income is taxable and creditable toward benefits only to the extent that the taxable wage incomes does reach the annual taxable wage limit of $4,800 (Section 211(b)(1)(C), 42 U.S.C.A., 1958 Pocket Part, 411(b)(1)(C)).

[9] A good example of this is furnished by the instant case. Appellee's employment record in the Bureau of Old-Age and Survivors Insurance (Tr. 47) nowhere discloses the amount of social security taxes paid throughout the period of his "covered" employment. The Social Security Administration advises that, according to the earnings records maintained by the Bureau, employment taxes due from (and presumably deducted from the earnings of) appellee amounted to $116.96. Benefit payments made to him prior to suspension totaled $611.60. Appellee's spouse has from November 1955 to July 1959 collected $1,262.90 in secondary benefits.

The number of "quarters of coverage" standing to a person's credit is the key to whether the basic "test" of "insured" status can be met. A quarter of coverage for a wage earner is a calendar quarter in which he has been paid $50 or more in wages for services in employment "covered" by Title II of the Social Security Act. (For agricultural labor, a quarter of coverage" is based upon a special formula). For the self-employed person, a "quarter of coverage" is a calendar quarter for which he has been credited with $100 or more of "self-employment" income. Section 213(a), 42 U.S.C., Supp. V, 413(a).

To be "fully insured", a person who was living on or after September 1, 1950, must have not less than 1 quarter of coverage, acquired any time since 1936, for each 2 calendar quarters that have elapsed after 1950 or after the quarter in which he attained age 21 (whichever is later), and up to but excluding the quarter in which he attained age 65 or died; he must, however, have a minimum of 6 quarters of coverage. Section 214(a), 42 U.S.C. 414(a). A person having acquired 40 quarters of coverage is, under present law, "fully insured," regardless of his employment or lack of employment thereafter. (For transitional devices, requiring less quarters of coverage, which benefit chiefly elderly persons in jobs newly covered by the 1950 and 1954 amendments, see *Staff Report, supra,* pp. 31–32.)

To be "currently insured", a person must have at least six quarters of coverage within the thirteen quarters ending with the quarter in which he dies or becomes eligible for retirement benefits. Section 214

(b), 42 U.S.C., Supp. V, 414(b). Only a limited number of benefits—such as payments to a widow or a dependent divorced wife who is caring for a minor child, payments to a dependent child, or lump-sum death payments—are payable if a person has attained only this minimum coverage status. See also *Staff Report, supra,* p. 32."

The 1954 amendments (68 Stat. 1080) also added the so-called "disability freeze" provision affecting the "insured status" condition of eligibility. Section 216(i), 42 U.S.C., Supp. V, 416(i). If a person has a "currently insured" status and 20 quarters of coverage out of the 40 calendar quarters ending with the quarter in which his period of disability began (which disability prevents him from engaging in any "sub-

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[11] Congress has on occasion changed the conditions for the attainment of a "fully insured" status. *E.g.*, since the 1950 amendments, the starting date of the elapsed period—during which an individual must meet the general rule of being in covered employment at least half the time, *supra*—begins with January 1, 1951 (Section 214(a)(2)(A), 42 U.S.C. 414(a)(2)(A); under the 1939 amendments, the starting date was January 1, 1937 (53 Stat. 1376). One of the effects of the 1950 "new start" provision was that as of September 1, 1950, there were an estimated 675,000 aged persons not previously eligible for benefits who became automatically eligible without having to work any more in covered employment, since they already had the necessary 6 quarters of coverage. *Analysis of the Social Security System*, Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83rd Cong., 1st Sess., p. 656.

The broad general effect of the "new start" provision was that, at least for the time being, it abbreviated the period of "covered employment" or "self-employment" necessary to establish eligibility for benefits to a minimum of six "quarters of coverage."

stantial gainful activity"), he can have his "insured status" frozen at the time of disablement.

If there were no such provision, he might, over a period of time, lose the "insured status" he had previously built up, and hence lose his right to benefits for himself, his dependents, or survivors. By this amendment Congress provided that a person totally disabled could have his "insured status" frozen at the time of disablement. In general, this provision has been made retroactive for all who may have suffered extended total disability at any time since the third quarter of 1941. This provision has since been liberalized.[12]

3. *Age.* The tests of eligibility with respect to age are simple. To be eligible for primary old-age benefits based upon his own earnings record, or for husband's, widow's, widower's, or parents' benefits, (*i.e.*, supplementary benefits), a man must have reached age 65, and a woman age 62. Section 216(a), 42 U.S.C., Supp. V, 416(a).[13]

[12] An example of an *adverse* effect upon the rights of a beneficiary is furnished by one aspect of the 1939 amendments. The original Act (49 Stat. 623) provided that old-age benefits be based upon the "total wages" paid to an individual over a fixed period of time. The 1939 amendments (53 Stat. 1376) replaced the original formula with one based on the "average monthly wage" over a more flexible period, whereby a worker who would reach retirement age at a later date might suffer a substantial decrease in benefits as compared with the amount which he would have received under the original Act. Yet another example is furnished by the 1950 amendments (64 Stat. 506), which deprived most individuals reaching age 22 after 1950 of their wage records for the calendar years 1937 through 1949, with the result that their benefits thereafter would be computed only on the basis of their earnings record after 1950.

[13] Age is immaterial for a wife's benefit if she has in her care

4. *The "Work Test"*. From the inception of the Title II program, one of its basic concepts has been that of conditioning the payment of benefits on an individual's lack of employment income. As applied to aged beneficiaries, the "work test," in effect, requires retirement as a condition of eligibility for payment of benefits. *Analysis of the Social Security System,* Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83rd Cong., 1st Sess., pp. 696–730.

Since the beginning of 1955, the "work test" provides that an individual entitled to benefits (namely, one who has met all conditions for, and who has been awarded, primary or secondary benefits) shall not be entitled to be paid monthly insurance benefits while earning (or while the primary beneficiary is earning) in excess of $1,200 a year. The amount of benefits withheld depends upon the amount of earnings and the periods in which they were earned. Section 203 (b), (c) and (e)(1), 42 U.S.C., Supp. V, 403 (b), (c) and (e)(1)." This test applies to earnings from employment or self-employment, whether covered by Title II or not, with certain special rules applicable to employ-

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a child entitled to a child's benefit on the basis of her living aged husband's earnings. Section 202(g), 42 U.S.C. 402(g). For a detailed discussion of the various secondary benefits, see *Staff Report, supra*, pp. 35–36.

[14] The statute provides that for each $80 or fraction thereof in excess of $1,200 earned in a year, one month's benefit shall not be paid. However, benefits may not be withheld for any month in which the beneficiary (or the primary beneficiary) performs no services, or performs services for wages $100 or less, or performs no substantial services in self-employment.

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ment outside of the United States. Also, beginning in 1951 the work test was made wholly inapplicable to persons 75 or over (64 Stat. 490); and the 1954 amendments reduced the age limit to 72 (68 Stat. 1073). *Staff Report, supra,* page 36.[15]

The original 1935 Social Security Act did not provide for the employment of a person beyond the age of 65 (49 Stat. 625). Primarily for the purpose of permitting a person beyond age 65 to accumulate earnings credits toward the establishment of eligibility for benefits, however, the 1939 amendments recognized covered employment of an individual at any age to be acceptable toward eligibility (53 Stat. 1373). Such employment was, of course, made subject to the FICA tax. *Staff Report, supra,* p. 36.

B. FINANCING OF THE SOCIAL SECURITY PROGRAM

1. *Employees' "Contributions".* Based on extensive hearings conducted in 1953 by the House Subcommittee on Social Security of the Committee on Ways and Means, under the chairmanship of Representative Curtis, the *Staff Report,* to which repeated reference has been made, stated (*id.,* pp. 37–38):

> During the 18 years in which title II of the Social Security Act has been in effect, a belief

[15] The "work test" provides a good example of the liberal attitude which Congress has displayed over the years with respect to OASI benefits. In the original 1935 Act (49 Stat. 623), there was a prohibition against benefits being paid to any person receiving wages in regular employment. Under the 1939 amendments, the earnings limitation was fixed at $14.99 monthly in covered employment (53 Stat. 1367). It was increased to $50 monthly by the 1950 amendments (64 Stat. 490) and to $75 monthly by the 1952 amendments (66 Stat. 773).

has developed in the minds of many in this country that title II benefits are paid as the result of a contractual obligation on the part of the United States Government. Any such obligation would of necessity confer upon the beneficiary a contractual right to payment of the benefit specified. This belief has been fostered to a considerable extent by publications and other statements of responsible officials of the Social Security Administration.

Testimony and other evidence in the 1953 hearings clearly established that there is no contract involved in title II of the Social Security Act. Moreover, it was shown that section 1104 of the act, by which Congress retained "the right to alter, amend, or repeal any provision of this act" at any time had always been contained in the statute. Obviously, no contractual obligation on the part of the Government and no contractual right of a beneficiary could coexist with this reservation of power. Heretofore, these facts and their implications have not, for some reason, been conveyed to the public. [Footnote references omitted]

Once an individual meets the conditions of eligibility, he has a statutory, conditional right to receive title II benefits. This right continues so long as the statute creating the right is in effect and the individual can exercise this right so long as he continues to meet the conditions of eligibility. The value of this conditional right may be measured by the amount of benefits to which he is entitled.

Since it is a statutory right, Congress may expand or reduce the conditions of eligibility

and also the benefit values of the right. * * *
[Emphasis supplied.]

The old-age monthly benefits program which Title II of the Social Security Act establishes is not a federally-administered "insurance" program under which each worker pays "premiums" over the years and acquires at retirement age an indefeasible right to receive for life a fixed monthly benefit, or "annuity," irrespective of the conditions which Congress has chosen to impose from time to time. While the Act uses the term "insurance" (see, *e.g.*, Sections 201, 202, 42 U.S.C. 401, 402), the true nature of the program is to be determined from its actual incidents. Moreover, in context, it plainly refers to *social security* "insurance", not "insurance" in the conventional sense.

The plan of financing the OASI program contemplates that employees pay taxes on their annual earnings up to a maximum amount—$4,800 beginning in 1959. Each employer pays taxes at the same rate on the first $4,800 paid to each of his employees in the year. Year-by-year costs of the program are expected to grow for many years, and the Act provides that tax rates will gradually increase from a combined employer-employee rate of 5 percent in 1959, to an ultimate rate of 9 percent (to be reached in 1969).[16] The self-employed pay at a rate equal to one and one-half times the rate paid by the employee. An amount equal to the proceeds of these taxes is annually ap-

[16] *Financing Old-Age, Survivors, and Disability Insurance*; A Report of the Advisory Council on Social Security Financing, p. 7 (1959).

propriated to the "Federal Old-Age and Survivors Trust Fund." (The scheduled contribution rates include a fixed one-half of 1 percent combined employer-employee contribution for disability benefits for workers and their dependents—three-eighths of 1 percent for the self-employed—and an amount equal to the proceeds of this tax is annually appropriated to "Federal Disability Insurance Trust Fund," a fund separate from the Old-Age Trust Fund, *supra.*) Section 201 (a) and (b), 42 U.S.C., Supp. V, 401 (a) and (b).

The tax rates now scheduled are intended to provide enough income to meet all of the costs of the system into the indefinite future. Moneys appropriated to the Trust Fund in the early years of the program and not needed for immediate benefit payments must be invested in United States Government obligations. Section 201(d), 42 U.S.C., Supp. V, 401(d). The interest earnings on these obligations are available to help pay for the larger cost of the system in later years. The administrative expenses of the system, as well as the benefits, are paid from the Trust Fund.

The "contribution" exacted under the social security plan from an employee in covered employment, in the form of payroll deductions made by the employer on behalf of the Government and paid into the general Treasury, is a true *tax.* It is not comparable to a premium under a policy of insurance promising the payment of an annuity commencing at a designated age. The statutory authorization for the payroll deduction is codified in the Internal

Revenue Code and reads: "In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages * * *." [11] 26 U.S.C., Supp. V, 3101. The employer's contribution is an "excise tax" levied on his employees' payrolls. 26 U.S.C., Supp. V, 3111; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583. Likewise, a tax is levied on self-employment income, 26 U.S.C., Supp. V, 1401. These tax levies are "paid into the Treasury of the United States as internal-revenue collections," 26 U.S.C., Supp. V, 3501, the collections not being earmarked in any way. *Helvering* v. *Davis*, 301 U.S. 619, 635. That the contributions are true "taxes" in every sense of the word has been repeatedly established. See *Helvering* v. *Davis*, *supra*, at pp. 635, 645–646; *Cain* v. *United States*, 211 F. 2d 375, 377 (C.A. 5), certiorari denied, 347 U.S. 1013; *Abney* v. *Campbell*, 206 F. 2d 836, 841 (C.A. 5), certiorari denied, 346 U.S. 924.

2. *The (OASI) "Trust Fund"*. The so-called "Federal Old-Age and Survivors Insurance Trust Fund" established by Section 201(a) of the Social Security Act, from which benefits are paid to eligible individuals, is maintained by annual appropriations made by Congress "out of any moneys in the Treasury not otherwise appropriated * * *." Section

[11] The "tax" provisions applicable to the Social Security system were originally contained in Title VIII of the Social Security Act (49 Stat. 636), entitled "Taxes With Respect to Employment." It provided, *inter alia*, for an "Income Tax on Employees" and an "Excise Tax on Employers" (49 Stat. 636, 637).

201(a), 42 U.S.C., Supp. V., 401(a). As noted, the receipts from the social security taxes flow into the general funds of the Treasury. Since 1939, the Act has provided for an automatic annual appropriation from the general funds to the OASI "Trust Fund" in the amounts equal to the FICA (and, since 1951, also SECA) taxes collectible.[18] Most of the receipts of the "Trust Fund" are used for current benefits and administrative expenses of the program. The remainder is invested in federal securities. Earnings on securities held by the "Trust Fund" make possible a lower rate of taxes than would otherwise be required. (In fact, the interest now being received on the securities held by the "Trust Fund" is several times greater than the total administrative expense of operating the Social Security Program.[19])

The amount of assets required to be held at any one time in the "Trust Fund" to finance the OASI program, however, need not be computed in the same

[18] It is of interest to note that, in actual practice, the "Trust Funds" receive annual credits from the Treasury based upon the employees' wage records kept by the Social Security Administration, rather than the actual amount of FICA and SECA taxes collected. Thus, if for some reason the taxes due from an employee or an employer have not in fact been collected by the Internal Revenue Service, and that fact is known to the Social Security Administration, the "Trust Funds" will nevertheless be credited with the amount of taxes which should have been collected. On the other hand, penalties assessed in connection with FICA taxes are not covered into the "Trust Funds".

[19] *Facts About the Old-Age and Survivors Insurance Trust Fund*, U.S. Department of Health, Education, and Welfare, Pamphlet OASI-36, p. 6 (1958).

way as the amount of the reserve funds maintained by private insurance companies. Private life insurance companies must have reserves equal to the present value of all benefits less the present value of future premiums. These reserves are required since private companies must be prepared to pay benefit liabilities or cash surrender values even if they should cease writing new business. The OASI program, on the other hand, since it is compulsory under the Social Security Act, is assured of continuing participation because of the continuity of the law.[20]

It is thus apparent that the social security concept is of a program under which those with jobs in their productive years, their employers, and persons engaged in self-employment are taxed chiefly to provide the funds for current benefits to aged beneficiaries and other eligible survivors. Since the program has been conceived in perpetuity, the present individual taxpayer may anticipate that in his old age persons then in their productive years will do likewise. Congress, by establishing the "Trust Fund", contemplated a financial device in the nature

[20] Expenditures from the Federal Old-Age and Survivors Insurance Trust Fund during the fiscal year 1958 totaled $8,041 million, of which $7,875 million was for benefit payments and $166 million, including Treasury Department costs, for administrative expenses. Total receipts were $7,824 million, including $7,267 million in net contributions, $556 million in interest on investments, and $2 million in transfers from the railroad retirement account. Disbursements exceeded receipts by $216 million, the amount of the decrease in the trust fund during the year. At the end of June 1958 this fund totaled $22.8 billion. *Annual Report—1958*, U.S. Department of Health, Education, and Welfare, p. 27.

of a "contingency fund," whereby in good times there might be accretions to the fund, while in other years there may be decreases owing to an unforeseen rise in costs and also to a decline in FICA tax receipts and, hence, appropriations to the fund. See also *Staff Report, supra,* pp. 47–48. No beneficiary or prospective beneficiary acquires any interest in the fund itself.

C. THE TREATMENT OF ALIENS UNDER THE SOCIAL SECURITY PROGRAM

The original Social Security Act, as enacted in 1935, did not differentiate between beneficiaries of the program who were citizens and those who were aliens, and whether alien beneficiaries resided within the United States or took up residence abroad after becoming entitled to OASI benefits. Even at this earliest date, however, Congress made it clear that the purpose of Social Security was to "safeguard the security of the American family." S. Rept. 628, 74th Cong., 1st Sess., p. 2. Consistent with this purpose, and before the 1954 enactment of the section here in issue, Congress considered restricting, or suspending, payment of benefits to all aliens, and even to citizens of the United States, if they were to leave the country after qualifying for old-age benefits.

In 1939 (when Congress, by enacting the Social Security Act Amendments of 1939, virtually rewrote and greatly expanded the benefit provisions of the Social Security Act, *supra,* p. 31), the Senate adopted a floor amendment which would have provided that, beginning with January 1, 1941, social security benefits were not to be paid to foreign-borns who have not

become American citizens by that date, or within six years after entering this country. The same amendment also would have prohibited the payment of any benefit "to an individual while such individual is not a resident of the United States or its possessions unless such individual resides within 50 miles of the United States" (Senate amendment No. 182, 84 Cong. Rec. 9028–9030). The amendment, however, failed to gain the necessary support in the House, and in conference the Senate receded. H. Rept. No. 1461, 76th Cong., 1st Sess., pp. 1, 20.

The question of restricting or barring payment of benefits to persons residing abroad was reopened on a broad scale in 1953, in connection with the proposed Social Security Act Amendments of 1954. At the hearings held in November 1953 before a Subcommittee of the House Ways and Means Committee (*supra*, p. 38) on the question of benefits paid abroad, Chairman Curtis said in his opening statement:

> Today we are going to take up the subject of the payment of OASI benefits to individuals in foreign countries. The facts will show that the number of beneficiaries throughout the world has been increasing. This may create a number of problems.
>
> The development of these facts concerning the payment of old-age benefits and survivors benefits to individuals residing in foreign countries is not for the purpose of engaging in controversy over foreign policy or foreign aid. The concern of the Committee on Ways and Means in reference to the emerging global nature of social security has to do with the prob-

lems it creates in the field of social security. It is especially important that the Congress be informed on this in the light of the historic purpose of our Social Security Act which was restated in the 1951 Annual Report of the Federal Security Agency (p. 23) as follows:

> *"The intended function of the insurance program is to serve as a primary source of protection against economic insecurity for the American people."*
>
> The fact is that, although more than half of the 13.5 million persons in the United States who are over 65 are presently drawing no benefit of any kind from the social-security system, aged aliens as well as some Americans scattered all over the world right now are drawing such benefits. [Emphasis added; *Analysis of the Social Security System,* Hearings, etc., *supra,* p. 80.]

It was established at the hearings that, in the period 1940 to 1953, total OASI benefits paid to recipients living outside of the United States had increased at a more rapid rate than the total paid to residents in the United States. *E.g.,* in 1940, only $37,000 were paid to nonresidents; by 1947, $1.6 million; by 1950, $6.7 million; by 1952, $13 million; by 1953, $16 million. The number of recipients of OASI benefits living abroad in 1953 was 30,000. *Staff Report, supra,* p. 64. The average monthly primary OASI benefits paid to aged persons living outside of the United States in December 1952 were higher than the average paid in the country as a whole and higher than the average payment in all but two of the then forty-eight states. *Id.,* at p. 65. It was furthermore

shown that in 1952 more OASI money was paid to persons living abroad than to persons living in any of twelve named states. Hearing Exhibit 17, *Analysis of the Social Security System*, Hearings, etc., *supra*, p. 126. Another item of interest to the Committee was the fact that the eligibility conditions for the payment of benefits under the then existing Act contained no geographical restrictions upon the payment of OASI benefits (*id.*, at p. 127), and individuals receiving OASI benefits abroad were not subject to suspension of benefits whenever they earned wages in excess of the then specified amount in the "work test" clause.[21]

Concluding that portion of the hearings dealing with OASI benefits paid abroad, Chairman Curtis stated in part (*id.*, at pp. 186–187):

> This hearing has shown that the United States now has treaties in force with Italy, Ireland, and Japan, and treaties that are signed and ratified but not yet in force with Uruguay, Greece, and Israel, which relate to social security benefits.
>
> The provision that appears in these treaties provides in substance that the United States must treat the nationals of those countries the same as we treat our own citizens in the payment of benefits under Title II of the Social Security Act, which is the old age and survivors section.

[21] This was because work abroad, except that performed by an American citizen for an American employer, is not considered to be "covered employment" within the terms of the Social Security Act.

According to the State Department interpretation, this means, for instance, that a national of the country of Ireland could come to the United States and, by working the required length of time in a covered occupation, become eligible for benefits, return to Ireland and draw his benefits in that country.

This treaty provision as further interpreted by the State Department provides that this national of Ireland could choose to live in France, or South Africa, or Hong Kong, or any place else, and we would have to pay his old age benefits if we paid benefits to our own citizens who went to that particular place in retirement.

It is possible for some unusual situations to develop by reason of these treaty provisions. A national of the country of Italy who came to this country at age 65 in 1950 could have entered covered employment in this country and, by working 18 months here, become eligible for the maximum old age benefit.

This Italian national could return to Italy and not only continue to draw his social security check from the United States but, if he married a young woman and proceeded to raise several children, we would have to pay a child's benefit for each child during the years of his retirement. Upon the death of that Italian national the United States would have to pay survivor benefits to his widow and children until the youngest child reached 18. The claim against the United States may not even end at that point if this Italian woman is still the unmarried widow of this Italian national. She will again draw a widow's benefit when she

> reaches 65, even though she and the children have never lived in the United States.
>
> The example that I have cited in reference to what could happen in the case of the Italian national, his wife and children, and his widow has a similar application to the nationals for any country. * * *

Subsequent to these hearings, the House adopted three amendments to the proposed 1954 social security legislation, the first of which would have suspended payment of benefits to certain deportees; the second would have prohibited payment of dependents' and survivors' benefits to persons residing abroad; and the third amendment would have excluded earnings derived by an alien during periods of unlawful residence in the United States from being used to establish a wage record for OASI purposes. H. Rept. No. 1698, 83rd Cong., 2nd Sess., pp. 24–25, 76–77.

The Senate version of the bill did not contain any of these three provisions. S. Rept. No. 1987, 83rd Cong., 2nd Sess., pp. 23, 76. In conference, it was agreed that only the first of the aforementioned three provisions should be enacted. H. Rept. No. 2679, 83rd Cong., 2nd Sess., p. 4.

This amendment, in turn, became subsection (n) of Section 202 of the Social Security Act, Appendix A, *infra*, pp. 91–92, which now provides that (1) no monthly benefits shall be paid to any alien on the basis of his wages and self-employment income for any month after the Attorney General notifies the Secretary of Health, Education and Welfare that such alien has been deported under any one of fourteen specified

paragraphs of Section 241(a) of the Immigration and Nationality Act, and before he has been lawfully readmitted to the United States, (2) no benefits shall be paid to any survivors or dependents of an alien so deported and not lawfully readmitted for any month in which such auxiliary beneficiaries are outside the United States, unless they (the survivors and dependents of the deportee) are citizens of the United States, and (3) *inter alia,* earnings by an alien, after he has been deported and prior to his lawful readmission, shall not deprive (by virtue of the "deductions" provision) his survivors and dependents of benefits to which they are otherwise entitled. (As shown earlier, *supra,* p. 37, auxiliary benefits are normally subject to suspension if the primary beneficiary—after retirement, and before reaching age 72—has income in excess of a certain amount. Section 203 (b) and (c), 42 U.S.C., Supp. V, 403 (b) and (c).)

In line with its policy of preventing the country's welfare payments from being dissipated abroad, Congress in 1954 also amended Section 203 of the Act, for the first time providing for "deductions" on account of noncovered remunerative activity outside the United States, if the beneficiary (regardless of his citizenship) be under the age of 72, and if he engage in such activity on seven or more calendar days in a month. Section 203(b)(2) and (k), 42 U.S.C., Supp. V, 403(b)(2) and (k). (It will be recalled that heretofore a primary beneficiary living in a foreign country was not ordinarily subject to the "work test", *supra,* p. 48, fn. 21.) *Analysis of the Social Security System,* Hearings, etc., *supra,* p. 86.

Two years later, the Social Security Amendments of 1956 continued the congressional policy of focusing upon beneficiaries abroad by additional provisions relating to the payment of benefits to aliens who voluntarily absent themselves from the United States for longer than six months. Section 202(t), 42 U.S.C., Supp. V, 402 (t), now provides for a suspension of benefits to such a non-resident alien, unless the alien becomes a resident of a foreign country which permits citizens of the United States to draw full benefits under its own welfare programs while living outside that sovereign's territory;[22] or unless the alien had forty quarters of coverage; or had resided for ten years or longer in the United States; or was one of a certain group of railroad employees; or had died in, or as a result of, military service; or unless a treaty provision in force when Section 202(t) took effect precludes such suspension.

It should be noted that in the case of deported aliens, as well as aliens who absent themselves voluntarily, payments are not finally terminated, but suspended pending their lawful return to this country. Also, the benefits which become payable to auxiliary beneficiaries in this country—where citizens or aliens—are in no way affected by the alien primary bene-

[22] For example, 23 Fed. Reg. 5673–74 (1958) lists 36 countries which do not meet the requirement of Section 202(t) because they have either no social insurance or pension system of general application under which periodic benefits are paid on account of old age, retirement, or death, or because under their system citizens of the United States who qualify for such benefits are not permitted to receive them while outside of such foreign country, without regard to the duration of the absence. See also Appendix C, *infra*, pp. 105–106.

ficiary's suspension of payments because of his absence from the United States.[23] This, again, is in keeping with the policy that welfare benefits which might become payable under the Social Security Act be restricted as far as practicable to citizens and alien residents of the United States.

To summarize, it is manifest that under the amended program—absent treaty provisions—the physical presence of an alien beneficiary in this country is often of dominant importance to his continued receipt of OASI benefits, even though original eligibility has been attained.

III. APPELLEE'S INTEREST IN RECEIVING SOCIAL SECURITY BENEFITS WAS NOT A FULLY ACCRUED PROPERTY RIGHT VESTED IN HIM AND IMMUNE FROM CONGRESSIONAL CHANGE

The essence of the decision below was that appellee was denied due process in being deprived of what the court referred to as a "fully accrued" "property right" (R. 40), *i.e.*, the right to the continued receipt of social security benefits once they have been awarded—"through a legislative enactment which took such benefits because of deportation" (R. 40), even though such enactment was already part of the Social Security Act at the time appellee first became eligible for any benefits. We believe this view that such benefits are "fully accrued property rights" or "vested rights" is wholly erroneous.

[23] See fn. 10, *supra*, p. 33, where we point out that Mrs. Nestor's secondary benefits were in no way affected by the suspension of appellee's benefits because of his deportation.

A. THE GENERAL PRINCIPLES APPLICABLE TO BENEFIT LEGISLATION

1. This Court has had frequent occasion to point out the difference between insurance which creates vested rights, and pensions and other gratuities—bounties of government—involving no contractual obligations. Thus, in *Lynch* v. *United States,* 292 U.S. 571, where it was held that policies of yearly renewable term insurance issued under the War Risk Insurance Act were not gratuities but contracts of the United States, Mr. Justice Brandeis said for the Court (*id.,* at pp. 576–577):

> War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. *Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. United States* v. *Teller,* 107 U.S. 64, 68; *Frisbie* v. *United States,* 157 U.S. 160, 166; *United States* v. *Cook,* 257 U.S. 523, 527. * * * [Emphasis added.]

And *United States* v. *Cook,* 257 U.S. 523, deciding that the allowance of a fee to a building contractor under a cost-plus contract with the United States was not a gratuity, contains the following (*id.,* at p. 527):

> Reference is made to *Frisbie* v. *United States,* 157 U.S. 166, and other cases in which a pen-

> sion is said to be a gift and not a vested right. These cases have no bearing on the one before us. They merely establish that Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right.

The question as to the "vesting" of benefits under a gratuity-type pension system was squarely in issue in *Pennie* v. *Reis*, 132 U.S. 464. There, a police officer who expected payment under a state statutory pension program upon his death had died 8 days after the statute had been amended in a manner which eliminated his former eligibility. This Court held that his estate had acquired no vested right in the pension fund, even though the statute which established this pension had not been expressly subject to revision. (It was pointed out in passing that had the employee died or retired *before* the pension act covering him was amended—*i.e.*, had he met the required statutory conditions precedent before the amendment became effective—the amount due him under the old act might have "vested" in him, or upon his death, in his estate.) Said the Court (*id.*, at p. 471):

> * * * It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under

certain conditions, was subject to change or revocation at any time, at the will of the legislature. *There was no contract on the part of the State that its disposition should always continue as originally provided.* Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. * * * [Emphasis added.]

2. State and territorial legislation establishing retirement or pension plans for employees of the various branches of government, frequently providing for compulsory employee contributions to the retirement funds, has been usually interpreted as not creating any vested rights to retirement (or "pension") payments which have not become due and payable prior to amendatory legislation reducing the amount of the payments—or even completely terminating them.

For a case reaching this Court from California, and presenting this very question, see our discussion of *Pennie* v. *Reis*, 132 U.S. 464, *supra*, p. 55–56. In *Dodge* v. *Board of Education*, 302 U.S. 74, the Court upheld the decision of a state court that the Illinois Miller Law, providing for compulsory retirement and for the payment of annuities to retired teachers, gave them no vested or contractual rights, notwithstanding that the term "annuities" was used rather than "pensions." The claim that an amendatory statute reducing the pensions impaired the contract rights of school teachers in respect of retirement privileges and

pay was rejected, the opinion of the Court adopting the rationale of the state decision (*id.*, at p. 80):

> The Supreme Court [of Illinois] answered this contention by referring to the fact that for years prior to the adoption of the Miller Law, and by a uniform course of decision, it had held that acts indistinguishable from the Miller Law, establishing similar benefit systems, did not create contracts or vested rights and that the State was free to alter, amend, and repeal such laws even though the effect of its action was to deprive the pensioner or annuitant, for the future, of benefits then enjoyed. * * *

Similarly, in *MacLeod* v. *Fernandez*, 101 F. 2d 20 (C.A. 1), certiorari denied *sub nom. Toste* v. *MacLeod*, 308 U.S. 561, the Court of Appeals reversed the Supreme Court of Puerto Rico (which had affirmed a judgment for plaintiff) in a mandamus action by a retired employee of the Insular Government of Puerto Rico to compel payment to him of a pension at the monthly rate in effect at his retirement in 1931—and which was paid to him up to July 1935, rather than at the reduced rate provided by an amendatory statute. The court held that the plaintiff had not acquired a vested right in the pension fund to which he had made compulsory contributions, and therefore the 1935 Puerto Rican law reducing the amount of the pension was not violative of the provision of the Organic Act of Puerto Rico prohibiting the enactment of laws depriving any person of property without due process of law.

The same principle has been announced by other state tribunals asked to pass upon the question whether

a pensioner acquires a contractual or vested right to the continued receipt of retirement benefits which would bar changes adverse to him in the governing statute. See, *e.g.*, *McCann* v. *Retirement Board*, 331 Ill. 193, 162 N.E. 859; *Talbott* v. *Independent School District of Des Moines*, 230 Iowa 949, 299 N.W. 556; *Brown* v. *City of Highland Park*, 320 Mich. 108, 30 N.W. 2d 798; *Johnson* v. *State Employees' Retirement Ass'n*, 208 Minn. 111, 292 N.W. 767; *Lickert* v. *City of Omaha*, 144 Neb. 75, 12 N.W. 2d 644; *Bader* v. *Crone*, 116 N.J.L. 329, 184 A. 346; *Mell* v. *State*, 130 Ohio St. 306, 199 N.E. 72; *City of Dallas* v. *Trammell*, 129 Tex. 150, 101 S.W. 2d 1009.

A recent example is furnished by a Massachusetts case, in which the state legislature had amended the conditions of coverage of the state employees' retirement system so that past service in the General Court (the legislature) would no longer qualify for entitlement to retirement benefits. In *McCarthy* v. *State Board of Retirement*, 331 Mass. 46, 116 N.E. 2d 852, the court found no violation of plaintiff's constitutional rights in the discontinuance altogether of his benefits after the passage of the 1952 amendment, notwithstanding that he had received a monthly retirement allowance from January 1949 to September 1952 (*id.*, at p. 47, 116 N.E. 2d at pp. 853–854):

> * * * We reaffirm that the State employees' retirement system "creates no vested and immutable rights resting upon contract rather than upon legislative policy even after the beneficiary has become entitled to pension payments" * * * We cannot adopt the suggested qualification that the pension is subject to rea-

sonable alteration but not to complete abolition after the beneficiary has become entitled to payments.

B. THE LEGAL NATURE OF FEDERAL SOCIAL SECURITY BENEFITS

Under these general principles, consistently accepted by this Court, the right to federal social security benefits is a statutory, conditional, right, which the possessor enjoys subject to all the conditions which Congress has attached and may attach. It is a "creative right", as has been said, whose nature and character "are dependent upon the statute creating it." *Ewing* v. *Risher,* 176 F. 2d 641, 644 (C.A. 10).

1. This non-vested and non-contractual character of the benefits is plainly shown by the statutory scheme. As we have pointed out (*supra,* pp. 33; 43, fn. 18), benefits are computed individually in each case on the basis of earnings in "covered employment," rather than on the amount of taxes which an individual has paid while in such employment, and any relation which might exist between a worker's wages, the social security taxes which may have been levied on his pay over the years, and the benefits to which he is entitled in specified contingencies is subject to change at any time by Congress. The Secretary of Health, Education, and Welfare is even specifically authorized, regardless of the "time limitation" specified in Section 205(c), 42 U.S.C. 405(c), "to include [in the record of an individual's earnings] wages paid during any period in such year to an individual by an employer if there is an absence of an entry in the Administrator's [now Secretary's]

records of wages having been paid by such employer to such individual in such period * * *." Section 205(c)(5)(H), 42 U.S.C. 405(c)(5)(H).

A striking example of the lack of correlation between taxes paid and benefits received is the provision for the suspension of monthly benefits in the case of beneficiaries under the age of 72 who earn in excess of $1,200 per year. *Supra*, pp. 37–38. Another example of such lack of correlation is the wage credit which was afforded to servicemen by the 1946 and 1950 amendments to the Act, although no taxes had been levied or collected. Under this provision, servicemen are eligible for wage credits of $160 for each month of active duty up to 1957, provided their discharge or release was under conditions other than dishonorable. Section 217, 42 U.S.C. 417. A further example is seen in the fact that the benefits payable in the early years of the social security program are far in excess of the benefits that would be payable if the employee's own social security taxes, or "contributions", had been used to purchase an "annuity" under a private policy of insurance. *Analysis of the Social Security System*, Hearings, etc. *supra*, p. 943. At the 1953 hearings it was established that today's aged, as a group, will receive in benefits almost fifty times the amount which they have paid in FICA taxes. *Staff Report, supra*, pp. 69–70. Perhaps the most striking example is found in the so-called "new start" provisions enacted in 1950 (*supra*, p. 35, fn. 11).

Consistent with the non-contractual nature of OASI benefits is the ruling of the Internal Revenue Service

that monthly benefit payments are voluntary payments to the recipient by the Government—not in the nature of purchased annuities or additional wages—and hence within the scope of former Section 22(b)(3) of the Internal Revenue Code of 1939 (now 26 U.S.C., Supp. V, 102) exempting from taxation "the value of property acquired by gift * * *." I.T. 3447, Cumulative Bulletin 1941–1, p. 191; *Analysis of the Social Security System,* Hearings, etc., *supra,* pp. 970–975. Similarly, the Bureau of Employees' Compensation, Department of Labor, considers OASI benefits to be in the nature of gratuities rather than "salary, pay, or remuneration" within the meaning of Section 7 of the Federal Employees' Compensation Act, 5 U.S.C. 757.[24] See *Analysis of the Social Security System,* Hearings, etc., *supra,* pp. 976–979. And see *Helvering* v. *Davis, supra,* 301 U.S. 619, 640, where this Court noted that the "scheme of benefits" created by Title II of the Social Security Act is constitutional under the power of Congress to "spend money in aid of the 'general welfare'."

Moreover, since Congress has expressly reserved its "right to alter, amend, or repeal any provision" of the Social Security Act from its very inception in Section 1104 (Appendix A, *infra,* pp. 92–93), the suspension of benefits would have been proper and valid even if Section 202(n), pursuant to which this action was

[24] Section 7 prohibits the payment of any salary, pay or remuneration while the injured employee is in receipt of workmen's compensation under the Federal Employees' Compensation Act, and the question arose as to the nature of the benefit payments under the social security program, where such payments were based upon federal employment.

taken, had been passed *after* appellee became eligible for and commenced to receive his monthly benefits. In fact, however, Section 202(n) was enacted and took effect on September 1, 1954. Appellee first became eligible to receive social security benefits in November 1955 (*supra*, p. 4). The congressional action thus preceded the time when he first became eligible to apply for OASI benefits. Appellee's deportation, it is true, took place after his entitlement to benefits accrued, in July 1956, and it was his deportation which occasioned the suspension of his benefits. But the statutory authority for the suspension substantially antedated his original qualifying for benefits.

This, in short, is not a case in which Congress enacted a law having the effect of terminating or suspending a person's social security benefits after he had become entitled to and begun to receive them, but one in which the statutory basis for the suspension was already in existence when the beneficiary first became eligible for benefits. He thus took his benefits subject to their later suspension pursuant to an already existing law. See *Pfunie* v. *Reis*, 132 U.S. 464, discussed *supra*, pp. 55–56. The considerations arguing against the notion that any one has a "vested right" in the continued receipt of social security benefits once begun (*supra*, pp. 54–59) have special force in this case.

2. Constitutional challenges to other provisions of the Social Security Act which reduced or withheld benefits from individuals who (unlike appellee) had fully qualified for and were awarded such benefits

prior to the enactment of the provisions in question have been rejected by the lower federal courts.

In *Price* v. *Folsom*, 168 F. Supp. 392 (D.N.J.), the plaintiff, having retired from employment as a patent attorney, filed an application for, and was awarded, OASI benefits in July 1954. As the Social Security Act read at that time, self-employment income from the practice of law could not be the basis for imposing "deductions" from an individual's benefits by reason of earnings in excess of the statutory permitted amount which an individual could earn and still draw his monthly benefits. In January 1955, he opened his own law office. By the 1954 amendments to the Act which became effective January 1, 1955, all earnings, including the earnings of a self-employed lawyer, became the basis for "deductions," so as to make the benefits of Price (and of similarly situated beneficiaries) subject to "deductions."

Overruling the contention of an unconstitutional deprivation of "vested" rights, the court said, in part (*id.*, at p. 398):

> Price next contends that even if his income from the practice of law was to be included as a deduction from his benefits, the amendment of 1954 which requires this is unconstitutional as applied to him, because it operates to deprive him of the Social Security benefits to which he claims to have obtained a vested right at the time he received the award of such benefits in July, 1954.
>
> * * * * *
>
> It is a general rule that pension funds and payments made therefrom are a gratuitious al-

> lowance by the particular governmental body creating and authorizing them. As a consequence, a beneficiary of such a pension fund does not acquire a vested right to any payments therefrom except those which have actually become due and owing to the beneficiary. This is so whether the payments to the funds are voluntary or compulsory. *MacLeod* v. *Fernandez,* 1 Cir., 1938, 101 F. 2d 20, * * *.

Another case is *Mullowney* v. *Folsom,* 156 F. Supp. 34 (E.D.N.Y.); there, the claimant had qualified for and was paid OASI benefits commencing in April 1950. Under certain 1950 amendments to the Act which became effective on January 1, 1951, claimant's earnings as a self-employed real estate broker in excess of $50 per month served to suspend his OASI benefits for each month in 1951 in which his self-employment income exceeded such amount. It was contended that the recent introduction of the element of earnings resulting from self-employment was an unconstitutional exercise of power which should be held to be nugatory. The court rejected this contention, saying that the plaintiff (*Mullowney, supra,* at p. 36)

> * * * did not acquire a vested right in the Social Security payments allotted to him according to the terms of the Certificate [entitling him to OASI benefits] * * * which rendered them immune from the further exercise of Congressional control, pursuant to the terms of the Statute above quoted.

3. The court below placed considerable reliance on the decision of the Court of Claims in *Steinberg* v. *United States,* 163 F. Supp. 590 (R. 35–40). There, a

statute providing that retirement annuities should not be paid to persons who invoked the Fifth Amendment privilege against self-incrimination, when testifying with respect to their service as governmental employees before courts or congressional committees, was held to be unconstitutional as creating arbitrary and unreasonable discrimination between employees who have not availed themselves of the privilege and those who have.

We believe that decision to be clearly distinguishable in at least three vital respects. First, *Steinberg* involved an annuity under the Civil Service Retirement Act and a retirement fund towards which the annuitant had contributed over the years through deductions from his salary. Such contributions are not, and never have been, considered taxes; the retirement benefits under the Civil Service Retirement Act are "part of the inducement for remaining in the Government service" (163 F. Supp. at p. 593, concurring opinions). The payroll deductions under the Social Security Act, on the other hand, are, as we have shown, true taxes, and lack the incidents of "contributions" towards a retirement fund, or "annuity." *Supra,* pp. 38–42. Second, Steinberg's annuity was suspended because he availed himself of a constitutional right. Appellee's benefits were suspended as a consequence of his deportation under a concededly valid statute following proceedings whose legality was not questioned (*infra,* pp. 84, 87). Third, Steinberg had already become entitled to his retirement benefits when the so-called "Hiss Act" was passed; appellee, on the

other hand (as we have pointed out), had not become entitled to social security benefits when Section 202 (n) was enacted.

Ewing v. *Gardner,* 185 F. 2d 781 (C.A. 6), reversed in part on other grounds, 341 U.S. 321, also cited by the court below (R. 31), is likewise distinguishable. It involved an action by an executor of a deceased wage-earner's estate to recover primary (now known as old-age) insurance benefits to which the decedent had become entitled prior to his death. The Court of Appeals affirmed the lower court's judgment for the plaintiff (*Gardner* v. *Ewing,* 88 F. Supp. 315 (S.D. Ohio)) on the ground that the decedent had, in his lifetime, met all the statutory conditions precedent by having attained a "fully insured" status, reaching age 65, and filing an application for retirement benefits. It decided that proof of the fact that the applicant had attained the age of 65 was not required to be furnished during the applicant's lifetime, and in the absence of express statutory provision to the contrary, the furnishing of such proof was a condition precedent to *payment* but not to *liability.* The court concluded that if the wage-earner had a valid claim at the time of his death, his executor could enforce that claim as an asset of the estate after furnishing the required proof of the decedent's age. At one point the court did say (185 F. 2d at p. 784):

> We do not agree with appellant's [the Federal Security Administrator's] contention that appellee, as Executor, can not prosecute the claim. Although he is not a beneficiary des-

> ignated by the Act, he is enforcing the claim of a beneficiary who is designated by the Act. [Citing cases] * * * The right of the wage-earner to the primary benefit is not a gratuity but is a property right which can be enforced by court action. *Dismuke* v. *United States*, 297 U.S. 167, 170 * * *; *Lynch* v. *United States*, 292 U.S. 571, 576–577 * * *.

Aside from the propriety of the *Gardner* decision in the light of Congressional policy,[25] the Sixth Circuit's reference to a "property right" is plainly *obiter*, since its conclusion that the "right" was one "which can been forced by court action" is dispositive of the case. This, of course, is in harmony with our argument, *supra*, pp. 53*ff*, that the right is a "statutory" or "creative" right, and Section 205(g) of the Social Security Act, 42 U.S.C., Supp. V. 405(g), furnishes the express provision of Congress for judicial review (*supra*, pp. 20*ff*). The court's reliance,

[25] The result of the *Gardner* case is of questionable validity in that it permits payment of old-age benefits designed for "the decent support of elderly workmen who have ceased to labor" (*Social Security Board* v. *Nierotko*, 327 U.S. 358, 364), to the estate of a deceased wage-earner under circumstances where the decedent evidenced little interest in receiving the benefit—he ignored repeated requests to furnish proof of age as required.

See *Coy* v. *Folsom*, 228 F. 2d 276, 279 (C.A. 3), where it was pointed out that old-age benefits were "clearly intended to provide funds currently necessary to enable the insured to live," not to benefit his estate, and that the Act elsewhere provided specifically for survivors' benefits and lump-sum death benefits. In *Coy*, an executrix could not recover accrued old-age payments where the deceased wage-earner had not applied for such benefits during his lifetime—even though he had met all other statutory conditions—and his estate could acquire no "vested interest" in such benefits.

in its dictum, on the *Lynch* and *Dismuke* cases was quite mistaken. *Lynch* v. *United States*, 292 U.S. 571, as we show earlier (*supra*, p. 54), involved the rights of a beneficiary under a policy of War Risk insurance. Similarly, *Dismuke* v. *United States*, 297 U.S. 167, was concerned with "annuities" under the Civil Service Retirement Act, which this Court carefully distinguished from "pensions" (*id.*, at p. 170), holding that district courts had jurisdiction under the Tucker Act of claims for annuities.

4. In summary, social security must be viewed as a welfare instrument to which legal concepts of "insurance," "property," "vested rights," "annuities," etc., can be applied only at the risk of a serious distortion of language. We are dealing with a social instrument by which public action, involving compulsion, is invoked to deal with a social problem—the lack of basic economic security of large segments of our society. An understanding of the difficult and changing problems of public policy arising out of attempts to eliminate individual or family insecurity on a national scale will be obscured by Procrustean efforts to force the social security program into the mold of inappropriate analogies. As was said in *United States* v. *Vogue, Inc.*, 145 F. 2d 609, 612 (C.A. 4):

> The Social Security Act * * * was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules * * *.

What Congress had in mind was simply to inaugurate and maintain a program of social security motivated by a consideration of the general welfare of this country and its citizenry, as Congress views it. The Social Security Act declares a policy to be pursued until Congress shall ordain otherwise. If the privilege under the Social Security Act to benefits is to be called a "right," it is one which—by the very Act which created it—is expressly subject to amendment or repeal as Congress in its wisdom feels will best promote the general welfare. One recent writer on the question of vested rights in OASI benefits has properly stated:

> A system of contractual social insurance involves the arrogant assumption that ours is the wisest generation of Americans for some time to come. If we have the legal power to tell generations yet unborn how the national income shall be distributed in some indefinite future, we shall have to be very clever in the way we assert that prerogative.
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> A statutory program of benefits can pay out higher benefits and can risk larger responsibilities. If a statutory program offers more now than the economy can afford to furnish later, or if established policies develop adverse side effects, then Congress has only to revise the statutory program. If Congress ever commits itself irrevocably to a general social-insurance program, the program will have to be a modest one. [Wollenberg, *Vested Rights in Social-Security Benefits*, 37 Ore. L. Rev. 299, 359.]

We submit, therefore, that the court below erred in applying "vested rights" theory to this case (R. 40). Rather, as we have shown, the beneficiary has a statutory "right," contingent upon the continued existence of the law which created it, and subject to the expressly reserved power of Congress to amend or repeal any provision of the law. The only restraint which the Constitution places upon Congress in enacting subsequent amendatory legislation is that such legislation be reasonably related to the ultimate object sought to be attained, *i.e.* not arbitrary or unduly discriminatory. Whether Section 202(n) is at war with this principle is the subject we shall now discuss in Point IV (*infra*, pp. 70–87).

IV. SECTION 202(n) IS NOT REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, NOR DOES IT VIOLATE THE EX POST FACTO OR BILL OF ATTAINDER PROSCRIPTIONS OF THE CONSTITUTION

As we have indicated, the single articulated basis of the district court's action was that one who commences to receive OASI benefits acquires a vested or "property" right to the continued receipt of such benefits, so that Congress may not suspend payment of such benefits upon the occurrence of an event (here, deportation) without violating the Due Process Clause of the Fifth Amendment (R. 29*ff.*). We have answered that contention in the preceding portion of this brief (*supra*, pp. 53–70). But appellee's motion to affirm raised a number of additional issues (Motion, pp. 4–5), which, though urged in the district court (R. 25–27), failed, so far as the opinion reflects, to win that court's acceptance (R. 29*ff.*) Appellee

argues that Section 202(n) irrationally singles out a limited group for suspension of benefits, and further, as applied to him, that the Section imposes a penalty for having been, according to an administrative finding, a member of the Communist Party years before the enactment of the deportation statute and of the amendment to the Social Security Act here in issue. These contentions, too, should be rejected.

A. SECTION 202(n) DOES NOT ARBITRARILY DISCRIMINATE AGAINST THE GROUP OF WHICH APPELLEE IS A MEMBER

1. Appellee is an alien—now a nonresident alien—and Congress can constitutionally take that into account in the social security program. There is no constitutional prohibition against "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens * * *." *Truax* v. *Raich*, 239 U.S. 33, 39–40, and cases cited. Since the exclusion of aliens from welfare benefits would be lawful if adopted by a state, "it is lawful *a fortiori*, in legislation by the Congress, which is subject to restraints less narrow and confining" (*Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584).[28]

[28] Indeed, past history is not devoid of instances where Congress has excluded aliens altogether from benefits under the country's welfare legislation. See, *e.g.*, the Work Relief and Public Works Appropriation Act of 1938, 52 Stat. 809, c. 554, §11, where Congress provided that "No alien * * * who has not, prior to the date of enactment of this joint resolution, filed a declaration of intention [to become a citizen] * * *, shall knowingly be given employment or continued in employment on any project prosecuted under the appropriations in this title * * *."

Alienage has been traditionally recognized as a valid basis for the classification of individuals in law, as distinguished from race, creed, color, or indigence which this Court has called "constitutionally an irrelevance." *Edwards* v. *California*, 314 U.S. 160, 184–185. See, *e.g.*, *Patsone* v. *Pennsylvania*, 232 U.S. 138 (aliens excluded from hunting wild game); *Heim* v. *McCall*, 239 U.S. 175 (aliens excluded from employment on public works); *Clarke* v. *Deckebach*, 274 U.S. 392 (aliens excluded from operation of pool and billiard halls). See Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 375.

This is not to say, of course, that all discriminations based on alienage are valid. *Truax* v. *Raich*, *supra*, teaches, for example, that an alien has a right protected by the Constitution to earn a livelihood by following the ordinary occupations of life. The nub of the problem is always whether the distinction based on alienage has a reasonable relation to the purposes of the law, or to the "legitimate interests" of the sovereign. *Id.*, 239 U.S. at 42."

Reasons for the separate treatment of aliens in the social security program (see *supra*, pp. 45–53) readily suggest themselves. The function which Title II of the Social Security Act was designed to serve was primarily to promote the "general welfare" of the residents of *this* country. *Helvering* v. *Davis*, 301 U.S. 619, 640. It cannot be said that a claimant's citi-

" For examples of improper alienage classification, see Mr. Justice Douglas' dissenting opinion in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 598–599.

zenship or residence is irrelevant to that objective. "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II," said Mr. Justice Cardozo, "it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." *Id.*, 301 U.S. at 644. We suggest that, while Congress has made appropriations for the economic assistance of foreign countries and their citizens, it is free to keep these programs separate from the social security program; it follows that Congress could eliminate non-resident aliens altogether from coverage under the Social Security Act. Nor do we believe that it could be validly argued that Congress—having originally chosen not to distinguish between OASI beneficiaries on the basis of citizenship, or as regards aliens, on the basis of residence—is estopped from adopting that new policy, which it now deems will further the objectives of the program.[28]

2. It is true that not all deported aliens are subject to the suspension of OASI benefits by virtue of the

[28] The Social Security Administration advises that the records of the Bureau of Old-Age and Survivors Insurance disclose that, up to August 1959, 31 aliens have had payment of their OASI benefits suspended because of deportation since the enactment of Section 202(n) in 1954. The files of only 12 of these 31 cases are located in the Central Office of the Social Security Administration in Baltimore, Maryland. They reveal that three deportations were based upon paragraph (1) of Section 241(a) of the Immigration and Nationality Act (aliens excludable by the law existing at the time of their entry); one was based on paragraph (2) (aliens entering without inspection); three were based on paragraph (4) (aliens convicted of crimes involving moral turpitude); four were based on paragraph (6) (aliens who were or are members of the Communist Party); and one

provisions contained in Section 202(n) (although, as we show later, *infra*, p. 80, those deportees who are exempted from the operation of this section are likely to have their benefits suspended by virtue of other provisions).

Of the eighteen grounds for deportation enumerated under Section 241(a) of the Immigration and Nationality Act (Appendix A, *infra*, pp. 96–103), fourteen are cited in Section 202(n). A comparison of the fourteen paragraphs of Section 241(a) of the Immigration and Nationality Act cited in Section 202(n) with those not cited shows that the fourteen paragraphs cover the vast majority of causes of deportation and of deportees; and there are reasonable grounds for the exceptions. Those paragraphs of Section 241(a) not subject to the suspension provisions of Section 202(n) are paragraphs (3), (8), (9), and (13) of Section 241(a). H. Rept. No. 1698, 83rd Cong., 2nd Sess., p. 77, characterizes the *included* deportation provisions as involving "deportation because of unlawful entry, conviction of a crime, or subversive activity." The four excluded provisions do not fall into any of those categories.

Two of the excluded paragraphs, (3) and (8) (Appendix A, *infra*, pp. 96, 100–101), deal with persons de-

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case is listed simply as "deportation based on a narcotics charge" (presumably based on paragraph (11)).

An additional 173 aliens have had payment of their benefits suspended since 1956 because of the provisions of Section 202(t) (the alien nonresidence provision), discussed *supra*, p. 52, and *infra*, p. 80. In 10 of these instances benefit payments have been reinstated because of the aliens' return to the United States.

ported for becoming public charges within five years after entry. It may be that Congress felt at that time that it would be unfair to the other country to deport such destitute persons without letting them retain their modicum of social security benefits, or what is more likely, that such destitute persons, after so few years in this country, would be unlikely to have social security payments coming to them. (It will be noted that deportation under these two paragraphs is limited to the first five years after entry).

With respect to paragraph (9) (Appendix A, *infra*, p. 101), providing for the deportation of persons admitted as nonimmigrants who fail to maintain that status properly, Congress may, here too, have thought it unlikely that such persons would be eligible for social security benefits. Aliens having a "nonimmigrant" status are, as a general rule, not employed in private employment which would qualify as "covered employment" under the Social Security Act (these aliens being ambassadors, consuls, transients, alien crew members of foreign vessels, employees of international organizations, representatives of foreign press, radio and film, etc., or aliens who may not seek employment in the United States (such as exchange students)). Section 101(a)(15) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a)(15).

Paragraph (13) (Appendix A, *infra*, pp. 101–102) deals with aliens who, prior to or within five years after entry, aid other aliens to enter this country illegally. Here, again, because of the limitation of the scope of the paragraph to the first five years after entry, Con-

gress may have felt that persons coming within this category would be unlikely to have social security payments coming to them, so that it is improbable that there would be a significant number of aliens in this class who would present any problem from the standpoint of the remittance of social security payments to foreign countries.[29] But in any event, the fact that Congress has chosen not to bring within the purview of Section 202(n) *all* classes of deportees does not vitiate such legislation.

3. We are not unmindful of this Court's pronouncements that, even though the Fifth Amendment contains no Equal Protection Clause, grossly discriminatory or capricious legislation, or arbitrary administrative action, would violate federal due process. *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202; *Hurd* v. *Hodge*, 334 U.S. 24, 30; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. But even in the sphere of the Fourteenth Amendment it is well settled that legislation reasonably directed at correcting a particular problem is not violative of the Equal Protection Clause even though it be specifically limited to a particular group or class, although there are other groups or classes which logically might also have been embraced by the legislation. The test is always whether the legis-

[29] We have, for the convenience of this Court, reproduced in Appendix B, *infra*, p. 104, a statistical analysis of the total number of deportees for the years 1949–1953. This analysis was presumably available to Congress when the 1954 Amendments to the Social Security Act, respecting deportees, was being considered.

lation strikes at an evil within the police power of the state to correct.[30]

In *Heath & Milligan Co.* v. *Worst*, 207 U.S. 338, where this Court upheld a North Dakota statute requiring manufacturers and vendors of mixed paints to label the ingredients, although paste paints were not required to be so labelled, the Court said (pp. 354–355):

> We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislature. But *logical appropriateness of the inclusion or exclusion of objects or persons is not required.* * * * [E]xact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it. [Emphasis added.]

And in *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157, a similar attack against a state statute on the ground that it was not all-inclusive was rejected for the Court by Mr. Justice Holmes, who declared (pp. 160–161):

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[30] See, *e.g. Salsburg* v. *Maryland*, 346 U.S. 545, 551; *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 157–158; *Miller* v. *Wilson*, 236 U.S. 373, 383–384; *Semler* v. *Dental Examiners*, 294 U.S. 608, 610–611; *Hurwitz* v. *North*, 271 U.S. 40; *Watson* v. *Maryland*, 218 U.S. 173, 179–180; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79; *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584; *Missouri* v. *Lewis*, 101 U.S. 22, 31; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400; Corwin, *The Constitution of the United States of America*, Senate Document No. 170, 82nd Cong., 2d Sess. (1953 ed.) pp. 1145–1146, 1153–1156, n. 2.

> * * * [The legislature] may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. * * *
>
> * * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. * * *

See also *Keokee Coke Co.* v. *Taylor,* 234 U.S. 224, 227 ("a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see").

Certainly, the Due Process Clause of the Fifth Amendment—under which the instant statute must be tested—is at least equally as tolerant of reasonable Congressional classification. In *National Labor Relations Board* v. *Jones & Laughlin,* 301 U.S. 1, 46, this Court observed:

> * * * We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. [Citations omitted.]

And in *United States* v. *Petrillo,* 332 U.S. 1, where it was held that Congress did not arbitrarily discrimi-

nate against radio workers when it singled out broadcasting as needing protection from "feather-bedding"—a practice well-known in other fields—Mr. Justice Black, speaking for the Court, stated (pp. 8-9):

> * * * [I]t is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. * * * Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co. v. Davis*, 301 U.S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

Nor did Congress, in the case which originally brought one aspect of the social security program before the Court, unconstitutionally discriminate against non-agricultural employees when agricultural workers—hardly distinguishable from the former

class—were exempt from social security taxes. *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 585. See also *Hirabayashi* v. *United States,* 320 U.S. 81, 100; *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 401; *Detroit Bank* v. *United States,* 317 U.S. 329, 337–338.

4. Since Congress could, consistently with the purposes of the social security program, suspend the payments of OASI benefits to all aliens who are absent from the United States, it could validly pursue that policy by initially suspending OASI benefits of deportees alone. As we have just pointed out, the fact that a limited number of deportees was not at first embraced by the congressional regulation does not make such legislation unreasonable and arbitrary in the constitutional sense. It is noteworthy, however, that when Congress continued its policy by a later amendment (in 1956), though primarily applicable to aliens who voluntarily absent themselves from the country, it thereby also embraced the four classes of deportees previously excepted from the operation of Section 202(n). They are now subject to suspension of OASI benefits to the same extent as are aliens who fall within the purview of Section 202(t), *supra,* p. 52, which suspends benefits for many aliens living abroad for more than six months.

It is true that, in the case of deportees generally, the suspension of benefits commences immediately upon their deportation under Section 202(n). In the case of aliens who leave on their own, suspension does not begin until after they have been outside the United States for six consecutive months, Section 202(t)(1),

42 U.S.C., Supp. V, 402(t)(1). This distinction is not unreasonable, however. Congress may well have felt that the chance of a deported alien's early lawful return to this country (at which time his social security benefits would recommence) was sufficiently slight to warrant the immediate suspension of his benefit payments following his deportation, but has felt, on the other hand, that the alien who voluntarily leaves the country might well be planning on an early return, so that it would not be feasible to suspend his payments, during the initial period of his absence, until he had remained abroad for six consecutive months.

Thus, Section 202(n), viewed against the background of its legislative history and that of the whole Social Security Act, is devoid of any congressional intent to single out any one class of deportees for discriminatory treatment, or for treatment unrelated to the purposes of the social security program.

B. SUSPENSION OF BENEFITS IN THE CIRCUMSTANCES OF THIS CASE DOES NOT CONSTITUTE THE IMPOSITION OF PUNISHMENT

In an attempt to create a further constitutional infirmity, appellee suggests (Motion, *supra*, pp. 4–5) that Section 202(n) is invalid as a bill of attainder and as *ex post facto* legislation, since in his view it imposes punishment by legislative fiat, and punishes past acts retrospectively. This is an oft-made, but invalid, argument.

1. In recent years, the Court has had several occasions to canvass the concept of "punishment" in its constitutional sense. See, *e.g.*, *United States* v. *Lovett*, 328 U.S. 303; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Perez* v.

Brownell, 356 U.S. 44; *Trop* v. *Dulles,* 356 U.S. 86; *Speiser* v. *Randall,* 357 U.S. 513. The distillation of these cases is, we believe, still equivalent to the basic rule laid down almost a century ago in *Cummings* v. *Missouri,* 4 Wall. 277, 320: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, *the circumstances attending and the causes of the deprivation determining this fact.*" (Emphasis added.)

Needless to say, "punishment" is not imposed by legislation merely because a consequence ensues which is financially, emotionally, or otherwise objectionable or harmful to the person affected, and which may even incidentally add to the deterrent effect of the prison terms or fines which may be imposed as true criminal penalties for the same conduct. See *Trop* v. *Dulles,* 356 U.S. 86, 124–5 (dissenting opinion). The law knows many such disabilities or nonpenal sanctions. See *e.g., Helvering* v. *Mitchell,* 303 U.S. 391, 399–401; *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 554–555; *Rex Trailer Co.* v. *United States,* 350 U.S. 148.[31] See also, *e.g.,* 18 U.S.C. 202, 205, 206, 207, 216, 218, 281, 282, 290, 593, 1905, 1907, 1908, 1912, 1913, 2381, 2383, 2385, 2387. "The penal and remedial provisions are, therefore, distinct and cannot be confounded" (*O'Sullivan* v. *Felix,* 233 U.S. 318, 324). Civil regulations based on past conduct,

[31] These three cases involve, or refer to, the following nonpenal sanctions: (a) disbarment; (b) deportation of aliens; (c) denial or revocation of a license to practice a profession, trade, etc.; (d) forfeiture of goods; (e) additional tax, customs, etc., penalties and "additions" to taxes or duties; and (f) statutory sums for liquidating damages for fraud.

even though the regulation is harmful to the individual, are not invalid, or transformed into punitive sanctions, where they represent a *bona fide* exercise of regulatory power to accomplish a non-penal purpose, and are not designed to inflict punishment. Disbarment is a prime example. Cf. *Sacher* v. *Association of the Bar,* 347 U.S. 388. Another instance is furnished by *Hawker* v. *New York,* 170 U.S. 189, which upheld a state law preventing a doctor from practicing medicine, because of a criminal conviction occurring years before the statute was passed. See, also, *Barsky* v. *Board of Regents,* 347 U.S. 442. *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716, made the same general ruling as to the refusal of public employment for prior subsersive activity. And see *Adler* v. *Board of Education,* 342 U.S. 485; *United Public Workers* v. *Mitchell,* 330 U.S. 75; *American Communications Ass'n* v. *Douds,* 339 U.S. 382.[32]

2. The suspension of OASI benefits undoubtedly operates to appellee's detriment; but, as we have pointed out earlier in this brief (*supra,* p. 28*ff*), Congress has consistently over the years made changes in the social security program which it deemed in the interest of the social welfare of this country. In most instances, it was to the advantage of present and prospective beneficiaries; sometimes, however, the changes have worked to the detriment of particular

[32] See, generally, Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases,* 34 Ind. L.J. 231, 239–241, 249–251, 261–263, 270–271, 272–296.

groups or in select cases. It cannot be said that Mr. Mullowney was being "penalized" for earning income from self-employment in excess of $50 per month after January 1, 1951 (*supra*, p. 63). Nor can it be properly contended that Congress imposed a "penalty" on Mr. Price for gainfully engaging in the practice of law after January 1, 1955 (*supra*, p. 63), or that Congress is exacting a retribution from an alien who remains abroad for more than six months, when his OASI benefits are suspended pursuant to the mandate of Section 202(t) (*supra*, pp. 52, 80). In each instance, Congress acted in furtherance of the welfare program, even though the choice it finally made may be subject to disagreement or criticism. In short, the suspension or loss of OASI benefits does not in itself constitute "punishment". The law simply defines new conditions for qualification—conditions which are validly related to the ultimate object of the legislation.

The legislative scheme embodied in Section 202(n) proceeds on this principle. Here, deportation is specified as a disqualifying factor for the receipt of OASI benefits. Deportation itself is not punishment, *Mahler* v. *Eby*, 264 U.S. 32, 39; *Bugajewitz* v. *Adams*, 228 U.S 585, 591; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 595; *Galvan* v. *Press*, 347 U.S. 522, 531; *Marcello* v. *Bonds*, 349 U.S. 302, 314. The antecedent factors—criminal or other socially undesirable conduct—which lead to the alien's deportation are of no direct relevance to the social security program. What is of utmost relevance to the program, however, is an alien's presence in, or absence from, this country. It is the

living abroad which is the dominant factor, not punishment or retribution for past conduct. See *supra*, pp. 72–76, 80–81. Section 202(n) specifies no offense for which a person is deemed guilty and for which retribution is being exacted, nor does it evidence any intent to punish—either explicitly, by necessary inference from congressional records or debates, or because of absence of a valid legislative purpose. This is emphasized by the fact that a Section 202(n) suspension of payment terminates, and payments are resumed, upon the lawful readmittance of the individual to the United States.

Congress did not suspend appellee's OASI benefits immediately upon the determination that he was deportable as a member of a subversive organization, *i.e.*, after the original deportation order was entered. Although the facts are not revealed in the record in the court below, the Department of Justice files indicate that the deportation proceedings against appellee commenced as early as October 1953, and the Board of Immigration Appeals dismissed his appeal from the order of deportation on November 9, 1954 (R. 20–22)—more than a year prior to the time he first became eligible and applied for OASI benefits (November 13 and December 2, 1955, respectively; R. 15). Thus, throughout the period that apellee remained in the United States, his OASI eligibility was in no way impaired by the fact that he was then under order of deportation. It was appellee's *physical departure* which by the terms of Section 202(n) brought about the suspension of his benefits. This aspect of the case, too, refutes any idea of a punitive intent by Congress.

That Congress itself distinguishes between suspension of OASI benefits in furtherance of the social security program, on the one hand, and suspending such benefits for punitive purposes on the other, is exemplified by Section 202(u), 42 U.S.C., Supp. V, 402(u), added by the Social Security Amendments of 1956. This Section empowers a federal court, upon conviction of an individual for any of the offenses specified in that paragraph, and if the offense was committed after the date of the enactment of the Section, to impose an additional penalty whereby, in determining whether any monthly benefit is payable to such individual, and in determining the amount of such benefit, "* * * there shall not be taken into account—(C) any wages paid * * * in the calendar quarter * * * and (D) any net earnings from self-employment derived * * * during a taxable year in which such conviction occurs or during any prior taxable year."[33]

[33] The imposition of the additional penalty is left to the discretion of the court. However, in those cases where the court imposes this penalty, the convicted individual will lose, for the month of conviction and all months thereafter, OASI benefits to the extent that such benefits are based on the employment or self-employment records of any person for the period in which the conviction occurs or for any prior period. H. Rept. 2936, 84th Cong., 2d Sess., p. 36, gives an example how this provision will work. It should be noted that the additional penalty applies only to the individual convicted of the offense, and does not prejudice any of the rights of other individuals. The offenses for which the additional penalty may be imposed are those specified by 18 U.S.C. 791–798 (espionage and censorship); 18 U.S.C. 2151–2156 (sabotage); 18 U.S.C. 2381–2390 (treason, sedition and subversive activities); and offenses under Section 4, 112 and 113 of the Internal Security Act of 1950, as amended, 50 U.S.C. 783, 822, and 823.

3. Our argument that Section 202(n) does not impose punishment equally disposes of the contention that it constitutes *ex post facto* legislation. The suspension of OASI benefits in the circumstances of this case constitutes a prospective civil disability; the fact that it attached upon the occurrence of another civil disability—deportation—did not accomplish a metamorphosis into a criminal disability, *i.e.*, punishment. And with regard to appellee it is not even necessary to construe the statute as having any retrospective effect, as it would be had he become eligible for OASI benefits prior to the enactment of Section 202(n).

Appellee's *ex post facto* argument is but a spurious attempt to challenge the constitutional validity of his deportation because of membership in the Communist Party where such membership terminated before the enactment of the deportation statute. Even if the issue were still open, it certainly could not be raised in collateral fashion, as is attempted here, but only upon direct attack by means of judicial review of the final deportation order. No such review was sought in the instant case, appellee presumably being satisfied with the validity and regularity of the deportation proceeding. More importantly, however, the validity of the ground for appellee's deportation is established. *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 593; *Galvan* v. *Press, supra,* 347 U.S. at 531; cf. *Rowoldt* v. *Perfetto,* 355 U.S. 115.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

1. Section 202(a) of Title II of the Social Security Act, enacted by the Social Security Act Amendments of 1950, c. 809, Title I, 64 Stat. 482, as amended (42 U.S.C., Supp. V, 402(a)), provides in pertinent part:

OLD-AGE AND SURVIVORS INSURANCE BENEFIT PAYMENTS

OLD-AGE INSURANCE BENEFITS

SEC. 202. (a) Every individual who—

(1) is a fully insured individual (as defined in section 214 (a)),

(2) has attained retirement age (as defined in section 216 (a)), and

(3) has filed application for old-age insurance benefits * * *

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. * * * such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 15(a)) for such month.

2. Section 205(g) of Title II of the Social Security Act, enacted by the Social Security Act Amendments of 1939, c. 666, Title II, § 205(g), 53 Stat. 1370, as amended (42 U.S.C. 405(g)), provides:

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such de-

cision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of its answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before it files its answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its de-

cision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

3. Section 202(n) of Title II of the Social Security Act, enacted by the Social Security Amendments of 1954, c. 1206, Title I, § 107, 68 Stat. 1083, as amended (42 U.S.C., Supp. V, 402(n)), provides:

TERMINATION OF BENEFITS UPON DEPORTATION OF PRIMARY BENEFICIARY

(n)(1) If any individual is (after the date of enactment of this subsection) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—

(A) no monthly benefit under this section or section 223[2] shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary [of Health, Education and Welfare] is notified by the Attorney General that such individual has

[1] *I.e.*, the several categories of benefits, including the primary category now known as "old-age insurance benefits" payable to each "fully insured individual" who "has attained retirement age" and has applied therefor pursuant to Section 202(a) (42 U.S.C., Supp. V, 402 (a)).

[2] *I.e.*, the so-called "disability insurance benefits" (42 U.S.C., Supp. V, 423).

been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence,

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

Section 203 (b) and (c) of this Act [3] shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241(a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

4. Section 1104 of the Social Security Act (Act of August 14, 1935, c. 531, Title XI, 49 Stat. 648, 42 U.S.C. 1304), provides:

[3] Section 203(b) provides, *inter alia*, for "deductions" from monthly benefits on account of earnings in employment or self-employment in excess of a specified amount, if the beneficiary be under age 72. Section 203(c) provides for "deductions" from an auxiliary's (*e.g.*, wife's, child's, etc.) benefits because of work by the old-age insurance beneficiary (42 U.S.C., Supp. V, 403 (b) and (c)).

RESERVATION OF POWER

The right to alter, amend, or repeal any provision of this Act is reserved to the Congress.

5. Section 202(t) of Title II of the Social Security Act, enacted by the Social Security Amendments of 1956, c. 836, Title II, § 118(a), 70 Stat. 835, as amended (42 U.S.C., Supp. V, 402(t)), provides:

SUSPENSION OF BENEFITS OF ALIENS WHO ARE OUTSIDE THE UNITED STATES

(t)(1) Notwithstanding any other provision of this title, no monthly benefits shall be paid under this section or under section 223 to any individual who is not a citizen or national of the United States for any month which is

(A) after the sixth consecutive calendar month during all of which the Secretary finds, on the basis of information furnished to him by the Attorney General or information which otherwise comes to his attention, that such individual is outside the United States, and

(B) prior to the first month thereafter for all of which such individual has been in the United States.

(2) Paragraph (1) shall not apply to any individual who is a citizen of a foreign country which the Secretary finds has in effect a social insurance or pension system which is of general application in such country and under which

(A) periodic benefits, or the actuarial equivalent thereof, are paid on account of old age, retirement, or death, and

(B) individuals who are citizens of the United States but not citizens of such foreign country and who qualify for such benefits are permitted to receive such benefits or the actuarial equivalent thereof while outside such foreign country without regard to the duration of the absence.

(3) Paragraph (1) shall not apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of the enactment of this subsection.

(4) Paragraph (1) shall not apply to any benefit for any month if

(A) not less than forty of the quarters elapsing before such month are quarters of coverage for the individual on whose wages and self-employment income such benefit is based, or

(B) the individual on whose wages and self-employment income such benefit is based has, before such month, resided in the United States for a period or periods aggregating ten years or more, or

(C) the individual entitled to such benefit is outside the United States while in the active military or naval service of the United States.

(D) the individual on whose wages and self-employment income such benefit is based died, before such month, either (i) while on active duty or inactive duty training (as those terms are defined in section 210(m) (2) and (3)) as a member of a uniformed service (as defined in section 210(n)), or (ii) as the result of a disease or injury which the Administrator of Veterans' Affairs determines was incurred or aggravated in line of duty while on active duty (as defined in section 210(m)(2)), or an injury which he determines was incurred or aggravated in line of duty while on inactive duty training (as defined in section 210(m)(3)), as a member of a uniformed service (as defined in section 210(n)), if the Administrator determines that such individual was discharged or released from the period of such active duty or inactive duty training under conditions other than dishonorable, and if the Administrator certifies to the Secretary his determinations

with respect to such individual under this clause, or[4]

(E) the individual on whose employment such benefit is based had been in service covered by the Railroad Retirement Act which was treated as employment covered by this Act pursuant to the provisions of section 5(k)(1) of the Railroad Retirement Act.[5]

(5) No person who is, or upon application would be, entitled to a monthly benefit under this section for December 1956 shall be deprived, by reason of paragraph (1), of such benefit or any other benefit based on the wages and self-employment income of the individual on whose wages and self-employment income such monthly benefit for December 1956 is based.

(6) If an individual is outside the United States when he dies and no benefit may, by reason of paragraph (1), be paid to him for the month preceding the month in which he dies, no lump-sum death payment may be made on the basis of such individual's wages and self-employment income.

(7) Subsections (b) and (c) of section 203 shall not apply with respect to any individual for any month for which no monthly benefit may be paid to him by reason of paragraph (1) of this subsection.

(8) The Attorney General shall certify to the Secretary such information regarding aliens who depart from the United States to any foreign country (other than a foreign country which is territorially contiguous to the continental United States) as may be necessary to enable the Secretary to carry out the purposes of this subsection and shall otherwise aid, assist, and cooperate with the Secretary in obtaining such other information as may be

[4] Subsection (t)(4)(D) added by Pub. L. 85-238, § 1.
[5] Subsection (t)(4)(E) added by Pub. L. 85-927.

necessary to enable the Secretary to carry out the purposes of this subsection.

6. Section 241(a) of the Immigration and Nationality Act, c. 477, title II, 66 Stat. 204*ff*. (8 U.S.C. 1251(a)) provides in pertinent part:

GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turptitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265* unless he establishes to the

*Section 265 (8 U.S.C. 1305) requires each alien in this country to notify the Attorney General in writing, within 30

satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title,[7] or under section 36(c) of the Alien Registration Act, 1940,[8] or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended,[9] or has been convicted under section 1546 of title 18 of the United States Code.[10]

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political

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days of the first day of January of each year, of his current address and further to notify that official within ten days of each change of address.

[7] Section 266(c) (8 U.S.C. 1306(c)) provides penalties for the willful making by an alien of a false statement in a registration application filed under Section 262 (8 U.S.C. 1302), or for the fraudulent procurement of or attempt to procure his own or another's registration.

[8] Section 36(c) of the Alien Registration Act, 1940, 54 Stat. 675, was substantially identical with, and has been superseded by, Section 266(c) of the Immigration and Nationality Act, whose provisions are described in the preceding footnote.

[9] *I.e.*, the so-called "Foreign Agents Registration Act" (22 U.S.C. 611–621).

[10] Section 1546 of Title 18 punishes the forgery or counterfeiting of visas and other entry documents, and related offenses.

Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided,* That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950,[11] unless such aliens

[11] This section (50 U.S.C. 786) requires "Communist-action" and "Communist-front" organizations (as defined in 50 U.S.C. 782) to register with the Attorney General.

establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized Government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or

destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212(a) [12] unless the Attorney General is satisfied, in the case of any alien within category (C) of paragraph (29) of such section, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a pub-

[12] Section 212(a) (27) and (29) (8 U.S.C. 1182(a) (27) and (29)) provides for the exclusion from the United States of aliens who the Attorney General knows or has reason to believe seek to enter the United States to engage in activities prejudicial to the public interest or harmful to the welfare, safety, or security of the United States, or to engage in espionage, or sabotage, or to join or affiliate with any organization registered or required to be registered under Section 7 of the Subversive Activities Control Act, etc.

lic charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248,[13] or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 238(a)[14] and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival * * *;

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs * * *;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a);[15] or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry,

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[13] Section 248 (8 U.S.C. 1258) authorizes the Attorney General, with certain exceptions, to change the status of an alien lawfully admitted to the United States as a nonimmigrant from one nonimmigrant classification to any other nonimmigrant classification.

[14] Section 238(a) (8 U.S.C. 1228(a)) gives the Attorney General power to enter into contracts with transportation lines for the entry and inspection of aliens coming to the United States through foreign contiguous territory or adjacent islands.

[15] Section 212(a) (12) (8 U.S.C. 1182(a)(12)) provides for the exclusion from the United States of aliens who are prostitutes or who have been supported in whole or in part by the proceeds of prostitution.

shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;[16]

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: * * *[17]; or

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[16] Title I of the Alien Registration Act, 1940, 54 Stat. 670-671 (popularly known as the "Smith Act"), provided for the punishment of counseling insubordination or refusal of duty on the part of members of the armed forces (§§ 1, 5; now contained in 18 U.S.C. 2387) and teaching or advocating or conspiring to teach or advocate the violent overthrow of the Government of the United States (§§ 2, 3, 5; now contained in 18 U.S.C. 2385).

[17] There follows at this point in the text of paragraph 17 a large number of Acts and Criminal Code sections. These include: 18 U.S.C. 793 and 794 (espionage); 18 U.S.C. 2388 (making false reports in time of war to hinder military operations, etc); Act of October 6, 1917, 40 Stat. 385 (unauthorized manufacture, use, or possession of explosives in time of war);

(18) has been convicted under section 278 of this Act[18] or under section 4 of the Immigration Act of February 5, 1917.[19]

Act of May 22, 1918, 40 Stat. 559 (unauthorized entry into or departure from the United States in time of war); 18 U.S.C. 2151, 2153–2156 (sabotage); Selective Service Acts of 1940 and 1948; Universal Military Training and Service Act; 18 U.S.C. 871 (threats against the President); Trading with the Enemy Act; 18 U.S.C. 2384 (seditious conspiracy); and 18 U.S.C. 960 (setting on foot within the United States or taking part in a military expedition against a friendly foreign power).

[18] Section 278 (8 U.S.C. 1328) punishes the importation of aliens for purposes of prostitution.

[19] Section 4 of the Immigration Act of February 5, 1917, 39 Stat. 878, covered the same subject matter as is now dealt with in Section 278 of the Immigration and Nationality Act (see preceding footnote), and has been superseded by the latter.

APPENDIX B

Aliens deported (by cause) for the years ended June 30, 1949-53

	1953	1952	1951	1950	1949
Subversive or anarchistic	37	31	13	6	4
Criminals	680	778	1,036	790	1,034
Immoral classes	100	59	67	53	78
Violators of narcotics laws	53	40	62	55	70
Mental or physical defectives [1]	48	56	45	53	89
Previously excluded or deported	276	389	940	528	3,815
Remained longer than authorized	1,561	4,469	3,289	1,661	1,379
Entered without proper documents	9,734	9,636	5,322	1,382	998
Failed to maintain status [2]	791	475	266	224	329
Entered without inspection or by false statements	6,397	3,706	2,253	1,734	12,094
Likely to become public charges [3]	35	24	14	38	20
Miscellaneous [4]	144	377	169	199	149
Total	19,845	20,181	13,544	6,923	20,040

Source: Annual Report of the Attorney General—1953, p

[1] This class of deportees is now covered by paragraph (3) of section 241(a) of the Immigration and Nationality Act.

[2] Now covered by paragraph (9) of section 241(a).

[3] Now covered by paragraph (8) of section 241(a).

[4] Presumably this group includes those deportees now covered by paragraph (15) of section 241(a) [smuggling aliens].

APPENDIX C

Foreign Social Insurance Systems

Section 202(t) of the Social Security Act as amended (42 U.S.C., Supp. V, 402(t)), provides, among other things, that its provisions (for nonpayment of benefits to nonresident aliens) shall not apply to citizens of a foreign country which has a social insurance or pension system of general application in such country which pays benefits to American citizens entitled thereto regardless of whether they are outside that country and of the duration of their absence.

Of some 46 countries whose systems have been considered to date, the Secretary of Health, Education, and Welfare has found that 24 countries do not have a social insurance or pension system within the meaning of section 202(t). Those countries are:

Afghanistan	Lebanon
Australia	Liberia
Burma	Libya
Ceylon	Pakistan
Colombia	Philippines
Cuba	Saudi Arabia
Egypt	South Korea
Ethiopia	Syria
Formosa	Thailand
Indonesia	Union of South Africa
Jordan	Venezuela
Laos	Vietnam

In addition, the following 18 countries have been found to have social insurance or pension systems

which do not pay benefits to American citizens outside of those countries:

Argentina	Iraq
Cambodia	Mexico
Canada	New Zealand
Czechoslovakia	Paraguay
Denmark	Peru
Dominican Republic	Poland
France	Spain
Hungary	Switzerland
Iceland	Tunisia

The following country has been found to have a social insurance or pension system that pays American citizens outside the country, but not necessarily on the same basis as they would be paid inside the country: United Kingdom of Great Britain and Northern Ireland.

The following 3 countries have been found to have social insurance or pension systems that pay benefits to American citizens outside the country on the same basis as any eligible is paid inside the country: Austria, Bolivia, Yugoslavia.

The following 8 countries have social insurance or pension systems under which American citizens may receive payment of benefits under conditions prescribed by reciprocity clauses of treaties between those countries and the United States:

Greece	Kingdom of the Netherlands (survivors benefits only)
Ireland	Nicaragua
Israel	West Germany[1]
Italy	
Japan	

[1] This information was supplied by the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, Department of Health, Education, and Welfare.

U.S. GOVERNMENT PRINTING OFFICE 1959

SUPREME COURT OF THE UNITED STATES

No. 54.—October Term, 1959.

Flemming, Secretary of Health, Education and Welfare, Appellant, v. Ephram Nestor.	On Appeal From the United States District Court for the District of Columbia.

[June 20, 1960.]

Mr. Justice Harlan delivered the opinion of the Court.

From a decision of the District Court for the District of Columbia holding § 202 (n) of the Social Security Act (68 Stat. 1083, as amended, 42 U. S. C. § 402 (n)) unconstitutional, the Secretary of Health, Education, and Welfare takes this direct appeal pursuant to 28 U. S. C. § 1252. The challenged section, set forth in full in the margin,[1] provides for the termination of old-age, survivor,

[1] Section 202 (n) provides as follows:

"(n)(1) If any individual is (after the date of enactment of this subsection) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—

"(A) no monthly benefit under this section or section 223 [42 U. S. C. § 423, relating to "disability insurance benefits"] shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence,

"(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such

and disability insurance benefits payable to, or in certain cases in respect of, an alien individual who, after September 1, 1954 (the date of enactment of the section), is deported under § 241 (a) of the Immigration and Nationality Act (8 U. S. C. § 1251 (a)) on any one of certain grounds specified in § 202 (n).

Appellee, an alien, immigrated to this country from Bulgaria in 1913, and became eligible for old-age benefits in November 1955. In July 1956 he was deported pursuant to § 241 (a)(6)(C)(i) of the Immigration and Nationality Act for having been a member of the Communist Party from 1933 to 1939. This being one of the benefit-termination deportation grounds specified in § 202 (n), appellee's benefits were terminated soon thereafter, and notice of the termination was given to his wife, who had remained in this country.[2] Upon his failure to obtain administrative reversal of the decision, appellee commenced this action in the District Court, pursuant to § 205 (g) of the Social Security Act (53 Stat. 1370, as

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month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and (C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

Section 203 (b) and (c) of this Act shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

"(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241 (a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation."

The provisions of § 241 (a) of the Immigration and Nationality Act are summarized in notes 10, 13, *post*.

[2] Under paragraph (1)(B) of § 202 (n) (see note 1, *ante*), appellee's wife, because of her residence here, has remained eligible for benefits payable to her as the wife of an insured individual. See § 202 (b), 53 Stat. 1364, as amended, 42 U. S. C. § 402 (b).

amended, 42 U. S. C. § 405 (g)), to secure judicial review.[1] On cross-motions for summary judgment, the District Court ruled for appellee, holding § 202 (n) unconstitutional under the Due Process Clause of the Fifth Amendment in that it deprived appellee of an accrued property right. 169 F. Supp. 922. The Secretary prosecuted an appeal to this Court, and, subject to a jurisdictional question hereinafter discussed, we set the case down for plenary hearing. 360 U. S. 915.

The preliminary jurisdictional question is whether 28 U. S. C. § 2282 is applicable, and therefore required that the case be heard below before three judges, rather than by a single judge, as it was. Section 2282 forbids the issuance, except by a three-judge District Court, of any "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution . . . ." Neither party requested a three-judge court below, and in this Court both parties argue the inapplicability of § 2282. If the provision applies, we cannot reach the merits, but must vacate the judgment below and remand the case for consideration by a three-judge District Court.

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[1] Section 205 (g) provides as follows:

"(g) Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive . . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

See *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977.

Under the decisions of this Court, this § 205 (g) action could, and did, draw in question the constitutionality of § 202 (n). See, *e. g.*, *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 345–346. However, the action did no more. It did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of appellee's benefits. In these circumstances we think that what was said in *Garment Workers* v. *Donnelly Co.*, 304 U. S. 243, where this Court dealt with an analogous situation, is controlling here:

> "[The predecessor of § 2282] does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress. . . . Had Congress intended the provision . . . for three judges and direct appeal, to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase 'drawn in question' . . . ." *Id.*, at 250.

We hold that jurisdiction over the action was properly exercised by the District Court, and therefore reach the merits.

I.

We think that the District Court erred in holding that § 202 (n) deprived appellee of an "accrued property right." 169 F. Supp., at 934. Appellee's right to Social

Security benefits cannot properly be considered to have been of that order.

The general purposes underlying the Social Security Act were expounded by Mr. Justice Cardozo in *Helvering* v. *Davis*, 301 U. S. 619, 640–645. The issue here, however, requires some inquiry into the statutory scheme by which those purposes are sought to be achieved. Payments under the Act are based upon the wage-earner's record of earnings in employment or self-employment covered by the Act, and take the form of old-age insurance and disability insurance benefits inuring to the wage-earner (known as the "primary beneficiary"), and of benefits, including survivor benefits, payable to named dependents ("secondary beneficiaries") of a wage-earner. Broadly speaking, eligibility for benefits depends on satisfying statutory conditions as to (1) employment in covered employment or self-employment (see § 210 (a), 42 U. S. C. § 410 (a))[1]; (2) the requisite number of "quarters of coverage"—*i. e.*, three-month periods during which not less than a stated sum was earned—the number depending generally on age (see §§ 213–215, 42 U. S. C. §§ 413–415); and (3) attainment of the retirement age (see § 216 (a), 42 U. S. C. § 416 (a)). § 202 (a), 42 U. S. C. § 402 (a).[1] Entitlement to benefits once gained is partially or totally lost if the beneficiary earns more than a stated annual sum, unless he or she is at least 72 years old. § 203 (b), (e), 42 U. S. C. § 403 (b), (e). Of special importance in this case is the fact that eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the pro-

[1] In addition, eligibility for disability insurance benefits is of course subject to the further condition of the incurring of a disability as defined in the Act. § 223, 42 U. S. C. § 423. Secondary beneficiaries must meet the tests of family relationship to the wage-earner set forth in the Act. § 202 (b)–(h), 42 U. S. C. § 402 (b)–(h).

gram through the payment of taxes, but rather on the earnings record of the primary beneficiary.

The program is financed through a payroll tax levied on employees in covered employment, and on their employers. The tax rate, which is a fixed percentage of the first $4,800 of employee annual income, is set at a scale which will increase from year to year, presumably to keep pace with rising benefit costs. I. R. C., §§ 3101, 3111, 3121 (a). The tax proceeds are paid into the Treasury "as internal-revenue collections," I. R. C., § 3501, and each year an amount equal to the proceeds is appropriated to a Trust Fund, from which benefits and the expenses of the program are paid. § 201, 42 U. S. C. § 401. It was evidently contemplated that receipts would greatly exceed disbursements in the early years of operation of the system, and surplus funds are invested in government obligations, and the income returned to the Trust Fund. Thus, provision is made for expected increasing costs of the program.

The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare,'" *Helvering* v. *Davis*, *supra*, at 640, whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of

an annuity, whose right to benefits are bottomed on his contractual premium payments.

It is hardly profitable to engage in conceptualizations regarding "earned rights" and "gratuities." Cf. *Lynch* v. *United States*, 292 U. S. 571, 576–577. The "right" to Social Security benefits is in one sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from "the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis*, *supra*, at 641. But the practical effectuation of that judgment has of necessity called forth a highly complex and interrelated statutory structure. Integrated treatment of the manifold specific problems presented by the Social Security program demands more than a generalization. That program was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.

To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands. See Wollenberg, Vested Rights in Social-Security Benefits, 37 Ore. L. Rev. 299, 359. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. That provision makes express what is implicit in the institutional needs

of the program. See Analysis of the Social Security System, Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83d Cong., 1st Sess., pp. 920–921. It was pursuant to that provision that § 202 (n) was enacted.

We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.

II.

This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of the cut-off provisions of § 202 (n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." *Helvering* v. *Davis*, *supra*, at 644. Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Such is not the case here. The fact of a beneficiary's residence abroad—in the case of a deportee, a presumably

permanent residence—can be of obvious relevance to the question of eligibility. One benefit which may be thought to accrue to the economy from the Social Security system is the increased over-all national purchasing power resulting from taxation of productive elements of the economy to provide payments to the retired and disabled, who might otherwise be destitute or nearly so, and who would generally spend a comparatively large percentage of their benefit payments. This advantage would be lost as to payments made to one residing abroad. For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply.[5] *See United States* v. *Petrillo*, 332 U. S. 1, 8–9; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584–585; *cf. Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 510–513. Nor apart from this, can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute.

We need go no further to find support for our conclusion that this provision of the Act cannot be condemned as so lacking in rational justification as to offend due process.

III.

The remaining, and most insistently pressed, constitutional objections rest upon Art. I, § 9, cl. 3, and Art. III,

[5] The Act does not provide for the termination of benefits of nonresident citizens, or of some aliens who leave the country voluntarily—although many nonresident aliens do lose their eligibility by virtue of the provisions of § 202 (t), 70 Stat. 835, as amended, 42 U. S. C. § 402 (t)—or of aliens deported pursuant to paragraphs 3, 8, 9, or 13 of the 18 paragraphs of § 241 (a) of the Immigration and Nationality Act. See note 13, *post*.

§ 2, cl. 3, of the Constitution, and the Sixth Amendment.[6] It is said that the termination of appellee's benefits amounts to punishing him without a judicial trial, see *Wong Wing* v. *United States*, 163 U. S. 228; that the termination of benefits constitutes the imposition of punishment by legislative act, rendering § 202 (n) a bill of attainder, see *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, 4 Wall. 277; and that the punishment exacted is imposed for past conduct not unlawful when engaged in, thereby violating the constitutional prohibition on *ex post facto* laws, see *Ex parte Garland*, 4 Wall. 333.[7] Essential to the success of each of these contentions is the validity of characterizing as "punishment" in the constitutional sense the termination of benefits under § 202 (n).

In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was

[6] Art. I, § 9, cl. 3:

"No bill of attainder or *ex post facto* law shall be passed."

Art. III, § 2, cl. 3:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed. . . ."

Amend. VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

[7] Appellee also adds, but hardly argues, the contention that he has been deprived of his rights under the First Amendment, since the adverse consequences stemmed from "mere past membership" in the Communist Party. This contention, which is no more than a collateral attack on appellee's deportation, is not open to him.

focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified. In the earliest case on which appellee relies, a clergyman successfully challenged a state constitutional provision barring from that profession—and from many other professions and offices—all who would not swear that they had never manifested any sympathy or support for the cause of the Confederacy. *Cummings* v. *Missouri, supra.* The Court thus described the aims of the challenged enactment:

> "The oath could not . . . have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. *It was required in order to reach the person, not the calling.* It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment . . . ." *Id.*, at 320. (Emphasis supplied.)

Only the other day the governing inquiry was stated, in an opinion joined by four members of the Court, in these terms:

> "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau* v. *Braisted*, — U. S. —, — (plurality opinion).

In *Ex parte Garland*, *supra*, where the Court struck down an oath—similar in content to that involved in *Cummings*—required of attorneys seeking to practice before any federal court, as also in *Cummings*, the finding of punitive intent drew heavily on the Court's first-hand acquaintance with the events and the mood of the then recent Civil War, and "the fierce passions which that struggle aroused." *Cummings* v. *Missouri*, *supra*, at 322.[8] Similarly, in *United States* v. *Lovett*, *supra*, where the Court invalidated, as a bill of attainder, a statute forbidding—subject to certain conditions—the further payment of the salaries of three named government employees, the determination that a punishment had been imposed rested in large measure on the specific Congressional history which the Court was at pains to spell out in detail. See 328 U. S., at 308–312. Most recently, in *Trop* v. *Dulles*, 356 U. S. 86, which held unconstitutional a statute providing for the expatriation of one who had been sentenced by a court-martial to dismissal or dishonorable discharge for wartime desertion, the majority of the Court characterized the statute as punitive. However, no single opinion commanded the support of a majority. The plurality opinion rested its determination, at least in part, on its inability to discern any alternative purpose which the statute could be thought to serve. *Id.*, at 97. The concurring opinion found in the specific historical evolution of the provision in question compelling evidence of punitive intent. *Id.*, at 107–109.

[8] See also *Pierce* v. *Carskadon*, 16 Wall. 234. A West Virginia statute providing that a nonresident who has suffered a judgment in an action commenced by attachment, but in which he had not been personally served and did not appear, could within one year petition the court for a reopening of the judgment and a trial on the merits, was amended in 1865 so as to condition that right on the taking of an exculpatory oath that the defendant had never supported the Confederacy. On the authority of *Cummings* and *Garland*, the amendment was invalidated.

It is thus apparent that, though the governing criterion may be readily stated, each case has turned on its own highly particularized context. Where no persuasive showing of a purpose "to reach the person, not the calling," *Cummings* v. *Missouri*, *supra*, at 320, has been made, the Court has not hampered legislative regulation of activities within its sphere of concern, despite the often-severe effects such regulation has had on the persons subject to it.[9] Thus, deportation has been held to be not punishment, but an exercise of the plenary power of Congress to fix the conditions under which aliens are to be permitted to enter and remain in this country. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; see *Galvan* v. *Press*, 347 U. S. 522, 530–531. Similarly, the setting by a State of qualifications for the practice of medicine, and their modification from time to time, is an incident of the State's power to protect the health and safety of its citizens, and its decision to bar from practice persons who commit or have committed a felony is taken as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment of ex-felons. *Hawker* v. *New York*, 170 U. S. 189. See *De Veau* v. *Braisted*, *supra* (regulation of crime on the waterfront through disqualification of ex-felons from holding union office). Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 397–401, holding that 50 percent addition to tax imposed with respect to deficiencies due to fraud was not punishment so as to prevent, upon principles of double jeopardy, its assessment against one acquitted of tax evasion.

Turning, then, to the particular statutory provision before us, appellee cannot successfully contend that the language and structure of § 202 (n), or the nature of the deprivation, requires us to recognize a punitive de-

[9] As prior decisions make clear, compare *Ex parte Garland*, *supra*, with *Hawker* v. *New York*, *supra*, the severity of a sanction is not determinative of its character as "punishment."

sum. Cf. *Wong Wing* v. *United States*, *supra* (imprisonment, at hard labor up to one year, of person found to be unlawfully in the country). Here the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the "infamous punishment" of imprisonment, as in *Wong Wing*, on which great reliance is mistakenly placed. Moreover, for reasons already given (*ante*, pp. —, —), it cannot be said, as was said of the statute in *Cummings* v. *Missouri*, *supra*, at 319; see *Dent* v. *West Virginia*, 129 U. S. 114, 126, that the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country bears no rational connection to the purposes of the legislation of which it is a part, and must without more therefore be taken as evidencing a Congressional desire to punish. Appellee argues, however, that the history and scope of § 202 (n) prove that no such postulated purpose can be thought to have motivated the legislature, and that they persuasively show that a punitive purpose in fact lay behind the statute. We do not agree.

We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher* v. *Peck*, 6 Cranch 87, 128.

Section 202 (n) was enacted as a small part of an extensive revision of the Social Security program. The provision originated in the House of Representatives. H. R. 9366, 83d Cong., 2d Sess., § 108. The discussion in the House Committee Report, H. R. Rep. No. 1698, 83d Cong., 2d Sess., pp. 5, 25, 77, does not express the purpose of the statute. However, it does say that the termination of benefits would apply to those persons who were "deported from the United States because of illegal entry, conviction of a crime, or subversive activity . . . ." *Id.*, at 25. It was evidently the thought that such was the scope of the statute resulting from its application to deportation under the 14 named paragraphs of § 241 (a) of the Immigration and Nationality Act. *Id.*, at 77.[10]

The Senate Committee rejected the proposal, for the stated reason that it had "not had an opportunity to give sufficient study to all the possible implications of this provision, which involves termination of benefit rights under the contributory program of old-age and survivors insurance . . . ." S. Rep. No. 1987, 83d Cong., 2d Sess., p. 23; see also *id.*, at 76. However, in Conference, the proposal was restored in modified form,[11] and as modified was enacted as § 202 (n). See H. R. Rep. No. 2679, 83d Cong., 2d Sess., p. 18.

Appellee argues that this history demonstrates that Congress was not concerned with the *fact* of a benefi-

[10] Paragraphs (1), (2), and (10) of § 241 (a) relate to unlawful entry, or entry not complying with certain conditions; paragraphs (6) and (7) apply to "subversive" and related activities; the remainder of the included paragraphs are concerned with convictions of designated crimes, or the commission of acts related to them, such as narcotics addiction or prostitution.

[11] For example, under the House version termination of benefits of a deportee would also have terminated benefits paid to secondary beneficiaries based on the earning records of the deportee. The Conference proposal limited this effect to secondary beneficiaries who were nonresident aliens. See note 2, *ante*.

ciary's deportation—which it is claimed alone would justify this legislation as being pursuant to a policy relevant to regulation of the Social Security system—but that it sought to reach certain *grounds* for deportation, thus evidencing a punitive intent.[12] It is impossible to find in this meagre history the unmistakable evidence of punitive intent which, under principles already discussed, are required before a Congressional enactment of this kind may be struck down. Even were that history to be taken as evidencing Congress' concern with the grounds, rather than the fact, of deportation, we do not think that this, standing alone, would suffice to establish a punitive purpose. This would still be a far cry from the situations involved in such cases as *Cummings*, *Wong Wing*, and *Garland* (see p. —, ante), and from that in *Lovett*, *supra*, where the legislation was on its face aimed at particular individuals. The legislative record, however, falls short of any persuasive showing that Congress was in fact concerned alone with the grounds of deporta-

[12] Appellee also relies on the juxtaposition of the proposed § 108 and certain other provisions, some of which were enacted and some of which were not. This argument is too conjectural to warrant discussion. In addition, reliance is placed on a letter written to the Senate Finance Committee by appellant's predecessor in office, opposing the enactment of what is now § 202 (u) of the Act, 70 Stat. 808, 42 U. S. C. § 402 (u), on the ground that the section was "in the nature of a penalty and based on considerations foreign to the objectives" of the program. Social Security Amendments of 1955, Hearings before the Senate Committee on Finance, 84th Cong., 2d Sess., p. 1319. The Secretary went on to say that "present law recognizes only three narrowly limited exceptions [of which § 202 (s) is one] to the basic principle that benefits are paid without regard to the attitudes, opinions, behavior, or personal characteristics of the individual . . ." It should be observed, however, that the Secretary did not speak of § 202 (n) as a penalty, as he did of the proposed § 202 (u). The latter provision is concededly penal, and applies only pursuant to a judgment of a court in a criminal case.

tion. To be sure Congress did not apply the termination provision to all deportees. However, it is evident that neither did it rest the operation of the statute on the occurrence of the underlying act. The fact of deportation itself remained an essential condition for loss of benefits, and even if a beneficiary were saved from deportation only through discretionary suspension by the Attorney General under § 244 of the Immigration and Nationality Act (66 Stat. 214, 8 U. S. C. § 1254), § 202 (*e*) would not reach him.

Moreover, the grounds for deportation referred to in the Committee Report embrace the great majority of those deported, as is evident from an examination of the four omitted grounds, summarized in the margin.[13] Inferences drawn from the omission of those grounds cannot establish, to the degree of certainty required, that Congressional concern was wholly with the acts leading to deportation, and not with the fact of deportation.[14] To hold otherwise would be to rest on the "slight implication and vague conjecture" against which Chief Justice Marshall warned. *Fletcher* v. *Peck*, *supra*, at 128.

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[13] They are: (1) persons institutionalized at public expense within five years after entry because of "mental disease, defect, or deficiency" not shown to have arisen subsequent to admission (§ 241 (a) (3)); (2) persons becoming a public charge within five years after entry from causes not shown to have arisen subsequent to admission (§ 241 (a) (8)); (3) persons admitted as nonimmigrants (see § 101 (a) (15), 66 Stat. 167, 8 U. S. C. § 1101 (a) (15)) who fail to maintain, or comply with the conditions of, such status (§ 241 (a) (9)); (4) persons knowingly and for gain inducing or aiding, prior to or within five years after entry, any other alien to enter or attempt to enter unlawfully (§ 241 (a) (13)).

[14] Were we to engage in speculation, it would not be difficult to conjecture that Congress may have been led to exclude these four grounds of deportation out of compassionate or *de minimis* considerations.

The same answer must be made to arguments drawn from the failure of Congress to apply § 202 (n) to beneficiaries voluntarily residing abroad. But cf. § 202 (t), *ante*, note 5. Congress may have failed to consider such persons; or it may have thought their number too slight, or the permanence of their voluntary residence abroad too uncertain, to warrant application of the statute to them, with its attendant administrative problems of supervision and enforcement. Again, we cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 54.—October Term, 1959.

Flemming, Secretary of Health, Education and Welfare, Appellant, v. Ephraim Nestor.	On Appeal From the United States District Court for the District of Columbia.

[June 20, 1960.]

Mr. Justice Black, dissenting.

For the reasons stated here and in the dissents of Mr. Justice Douglas and Mr. Justice Brennan I agree with the District Court that the United States is depriving appellee, Ephram Nestor, of his statutory right to old-age benefits in violation of the United States Constitution.

Nestor came to this country from Bulgaria in 1913 and lived here continuously for 43 years, until July 1956. He was then deported from this country for having been a Communist from 1933 to 1939. At that time membership in the Communist Party as such was not illegal and was not even a statutory ground for deportation. From December 1936 to January 1955 Nestor and his employers made regular payments to the Government under the Federal Insurance Contributions Act, 26 U. S. C. §§ 3101–3125. These funds went to a special federal old-age and survivors insurance trust fund under 49 Stat. 622, 53 Stat. 1362, as amended, 42 U. S. C. § 401, in return for which Nestor, like millions of others, expected to receive payments when he reached the statutory age. In 1954, 15 years after Nestor had last been a Communist, and 18 years after he began to make payments into the old-age security fund, Congress passed a law providing, among other things, that any person who had been deported from

this country because of past Communist membership under 66 Stat. 205, 8 U. S. C. § 1251 (a)(6)(C) should be wholly cut off from any benefits of the fund to which he had contributed under the law. 68 Stat. 1083, 42 U. S. C. § 402 (n). After the Government deported Nestor in 1956 it notified his wife, who had remained in this country, that he was cut off and no further payments would be made to him. This action, it seems to me, takes Nestor's insurance without just compensation and in violation of the Due Process Clause of the Fifth Amendment. Moreover, it imposes an *ex post facto* law and bill of attainder by stamping him, without a court trial, as unworthy to receive that for which he has paid and which the Government promised to pay him. The fact that the Court is sustaining this action indicates the extent to which people are willing to go these days to overlook violations of the Constitution perpetrated against anyone who has ever even innocently belonged to the Communist Party.

I.

In *Lynch* v. *United States*, 292 U. S. 571, this Court unanimously held that Congress was without power to repudiate and abrogate in whole or in part its promises to pay amounts claimed by soldiers under the War Risk Insurance Act of 1917, §§ 400–405, 40 Stat. 409. This Court held that such a repudiation was inconsistent with the provision of the Fifth Amendment that "no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Court today puts the *Lynch* case aside on the ground that "It is hardly profitable to engage in conceptualizations regarding 'earned rights' and 'gratuities.'" From this sound premise the Court goes on to say that while "The 'right' to Social Security benefits is in one sense 'earned.'"

yet the Government's insurance scheme now before us rests not on the idea of the contributors to the fund earning something, but simply provides that they may "justly call" upon the Government "in their later years, for protection from 'the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.'" These are nice words but they cannot conceal the fact that they simply tell the contributors to this insurance fund that despite their own and their employers' payments the Government, in paying the beneficiaries out of the fund, is merely giving them something for nothing and can stop doing so when it pleases. This, in my judgment, reveals a complete misunderstanding of the purpose Congress and the country had in passing that law. It was then generally agreed, as it is today, that it is not desirable that aged people think of the Government as giving them something for nothing. An excellent statement of this view, quoted by MR. JUSTICE DOUGLAS in another connection, was made by Senator George, the Chairman of the Finance Committee when the Social Security Act was passed, and one very familiar with the philosophy that brought it about:

> "It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than gratuity. . . .
>
> "Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect." 102 Cong. Rec. 15110.

The people covered by this Act are now able to rely with complete assurance on the fact that they will be compelled to contribute regularly to this fund whenever each contribution falls due. I believe they are entitled to rely with the same assurance on getting the benefits they have paid for and have been promised, when their disability or age makes their insurance payable under the terms of the law. The Court did not permit the Government to break its plighted faith with the soldiers in the *Lynch* case; it said the Constitution forbade such governmental conduct. I would say precisely the same thing here.

The Court consoles those whose insurance is taken away today, and others who may suffer the same fate in the future, by saying that a decision requiring the Social Security system to keep faith "would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands." People who pay premiums for insurance usually think they are paying for insurance, not for "flexibility and boldness." I cannot believe that any private insurance company in America would be permitted to repudiate its matured contracts with its policyholders who have regularly paid all their premiums in reliance upon the good faith of the company. It is true, as the Court says, that the original Act contained a clause, still in force, that expressly reserves to Congress "the right to alter, amend, or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. Congress, of course, properly retained that power. It could repeal the Act so as to cease to operate its old-age insurance activities for the future. This means that it could stop covering new people, and even stop increasing its obligations to its old contributors. But that is quite different from disappointing the just expectations of the contributors to the fund which the Government has com-

pelled them and their employers to pay its Treasury. There is nothing "conceptualistic" about saying, as this Court did in *Lynch*, that such a taking as this the Constitution forbids.

II.

In part II of its opinion, the Court throws out a line of hope by its suggestion that if Congress in the future cuts off some other group from the benefits they have bought from the Government, this Court might possibly hold that the future hypothetical act violates the Due Process Clause. In doing so it reads due process as affording only minimal protection, and under this reading it will protect all future groups from destruction of their rights only if Congress "manifests a patently arbitrary classification, utterly lacking in rational justification." The Due Process Clause so defined provides little protection indeed compared with the specific safeguards of the Constitution such as its prohibitions against taking private property for a public use without just compensation, passing *ex post facto* laws, and imposing bills of attainder. I cannot agree, however, that the Due Process Clause is properly interpreted when it is used to subordinate and dilute the specific safeguards of the Bill of Rights, and when "due process" itself becomes so wholly dependent upon this Court's idea of what is "arbitrary" and "rational." See *Levine* v. *United States*, —, U. S. —, — (dissenting opinion); *Adamson* v. *California*, 332 U. S. 46, 89–92 (dissenting opinion); *Rochin* v. *California*, 342 U. S. 165, 174 (concurring opinion). One reason for my belief in this respect is that I agree with what is said in the Court's quotation from *Helvering* v. *Davis*, 301 U. S. 619, 644:

> "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for

> us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

And yet the Court's assumption of its power to hold Acts unconstitutional because the Court thinks they are arbitrary and irrational can be neither more nor less than a judicial foray into the field of governmental policy. By the use of this due process formula the Court does not, as its proponents frequently proclaim, abstain from interfering with the congressional policy. It actively enters that field with no standards except its own conclusion as to what is "arbitrary" and what is "rational." And this elastic formula gives the Court a further power, that of holding legislative Acts constitutional on the ground that they are neither arbitrary nor irrational, even though the Acts violate specific Bill of Rights' safeguards. See my dissent in *Adamson* v. *California*, *supra*. Whether this Act had "rational justification" was, in my judgment, for Congress; whether it violates the Federal Constitution is for us to determine, unless we are by circumlocution to abdicate the power that this Court has been held to have ever since *Marbury* v. *Madison*, 1 Cranch 137.

III.

The Court in part III of its opinion holds that the 1954 Act is not an *ex post facto* law or bill of attainder even though it creates a class of deportees who cannot collect their insurance benefits because they were once Communists at a time when simply being a Communist was not illegal. The Court also puts great emphasis on its belief that the Act here is not punishment. Although not believing that the particular label "punishment" is of decisive importance, I think the Act does impose punishment even in a classic sense. The basic reason for Nestor's loss of his insurance payments is that he was once

a Communist. This man, now 69 years old, has been driven out of the country where he has lived for 43 years to a land where he is practically a stranger, under an Act authorizing his deportation many years after his Communist membership. Cf. *Galvan* v. *Press*, 347 U. S. 522, 532, 533 (dissenting opinions). Now a similar *ex post facto* law deprives him of his insurance, which, while petty and insignificant in amount to this great Government, may well be this exile's daily bread, for the same reason and in accord with the general fashion of the day—that is, to punish in every way possible anyone who ever made the mistake of being a Communist in this country or who is supposed ever to have been associated with anyone who made that mistake. See, *e. g.*, *Barenblatt* v. *United States*, 360 U. S. 109, and *Uphaus* v. *Wyman*, 360 U. S. 72. In *United States* v. *Lovett*, 328 U. S. 303, 315–316, we said:

> ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

Faithful observance of our holding in that case, in *Ex parte Garland*, 4 Wall. 333, and in *Cummings* v. *Missouri*, 4 Wall. 277, would, in my judgment, require us to hold that the 1954 Act is a bill of attainder. It is a congressional enactment aimed at an easily ascertainable group; it is certainly punishment in any normal sense of the word to take away from any person the benefits of an insurance system into which he and his employer have paid their moneys for almost two decades; and it does all this without a trial according to due process of law. It is true that the *Lovett*, *Cummings* and *Garland* Court opinions were not unanimous, but they nonetheless represent positive

precedents on highly important questions of individual liberty which should not be explained away with cobwebbery refinements. If the Court is going to overrule these cases in whole or in part, and adopt the views of previous dissenters, I believe it should be done clearly and forthrightly.

A basic constitutional infirmity of this Act, in my judgment, is that it is a part of a pattern of laws all of which violate the First Amendment out of fear that this country is in grave danger if it lets a handful of Communist fanatics or any other extremist group make their arguments and discuss their ideas. This fear, I think, is baseless. It reflects a lack of faith in the sturdy patriotism of our people and does not give to the world a true picture of our abiding strength. It is an unworthy fear in a country that has a Bill of Rights containing provisions for fair trials, freedom of speech, press and religion, and other specific safeguards designed to keep men free. I repeat once more that I think this Nation's greatest security lies, not in trusting to a momentary majority of this Court's view at any particular time of what is "patently arbitrary," but in wholehearted devotion to and observance of our constitutional freedoms. See *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (concurring opinion).

I would affirm the judgment of the District Court which held that Nestor is constitutionally entitled to collect his insurance.

SUPREME COURT OF THE UNITED STATES

No. 54.—October Term, 1959.

Flemming, Secretary of Health, Education and Welfare, Appellant, v. Ephram Nestor.	On Appeal From the United States District Court for the District of Columbia.

[June 20, 1960.]

Mr. Justice Douglas, dissenting.

Appellee came to this country from Bulgaria in 1913 and was employed, so as to be covered by the Social Security Act, from December 1936 to January 1955—a period of 19 years. He became eligible for retirement and for Social Security benefits in November, 1955 and was awarded $55.60 per month. In July, 1956 he was deported for having been a member of the Communist Party from 1933 to 1939. Pursuant to a law, enacted September 1, 1954, he was thereupon denied payment of further Social Security benefits.

This 1954 law seems to me to be a classic example of a bill of attainder which Art. I, § 9 of the Constitution prohibits Congress from enacting. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, 4 Wall. 277, 323.

In the old days punishment was meted out to a creditor or rival or enemy by sending him to the gallows. But as recently stated by Irving Brant,[1]

> ". . . By smiting a man day after day with slanderous words, by taking away his opportunity to earn a living, you can drain the blood from his veins without even scratching his skin.

[1] Address entitled Bills of Attainder in 1787 and Today. Columbia Law Review dinner 1954, published in 1959 by the Emergency Civil

> "Today's bill of attainder is broader than the classic form, and not so tall and sharp. There is mental in place of physical torture, and confiscation of tomorrow's bread and butter instead of yesterday's land and gold. What is perfectly clear is that hate, fear and prejudice play the same role today, in the destruction of human rights in America that they did in England when a frenzied mob of lords, judges, bishops and shoemakers turned the Titus Oates blacklist into a hangman's record. Hate, jealousy and spite continue to fill the legislative attainder lists just as they did in the Irish Parliament of ex-King James."

Bills of attainder, when they imposed punishment less than death, were bills of pains and penalties and equally beyond the constitutional power of Congress. *Cummings* v. *Missouri, supra,* at 323.

Punishment in the sense of a bill of attainder includes the "deprivation or suspension of political or civil rights." *Cummings* v. *Missouri, supra,* at 322. In that case it was barring a priest from practicing his profession. In *Ex parte Garland*, 4 Wall. 333, it was excluding a man from practicing law in the federal courts. In *United States* v. *Lovett*, 328 U. S. 303, it was cutting off employees' compensation and barring them pemanently from government service. Cutting off a person's livelihood by denying him accrued social benefits—part of his property interests—is no less a punishment. Here as in the other cases cited the penalty exacted has one of the classic purposes of punishment[2]—"to reprimand the wrongdoer, to deter others." *Trop* v. *Dulles*, 356 U. S. 86, 96.

Liberties Committee, under the title Congressional Investigations and Bills of Attainder.

[2] The broad sweep of the idea of punishment behind the concept of the bill of attainder was stated as follows by Irving Brant, *op. cit. supra*, note 1, 9–10:

Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. *See Social Security Board* v. *Nierotko*, 327 U. S. 358, 364. The funds are placed in the Federal Old-Age and Survivors Insurance Trust Fund, 42 U. S. C. § 401 (a); and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made. See Stark, Social Security: Its Importance to Lawyers, 43 A. B. A. J. 319, 321 (1957). As the late Senator George, long Chairman of

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"In 1794 the American people were in a state of excitement comparable to that which exists today. Supporters of the French Revolution had organized the Democratic Societies—blatantly adopting that subversive title. Then the Whisky Rebellion exploded in western Pennsylvania. The Democratic Societies were blamed. A motion censuring the Societies was introduced in the House of Representatives. There, in 1794, you had the basic division in American thought—on one side the doctrine of political liberty for everybody, with collective security resting on the capacity of the people for self-government; on the other side the doctrine that the people could not be trusted and political liberty must be restrained.

"James Madison challenged this latter doctrine. The investigative power of Congress over persons, he contended, was limited to inquiry into the conduct of individuals in the public service. 'Opinions,' he said, 'are not the subjects of legislation.' Start criticizing people for abuse of their reserved rights, and the censure might extend to freedom of speech and press. What would be the effect on the people thus condemned? Said Madison:

"'It is in vain to say that this indiscriminate censure is no punishment . . . . Is not this proposition, if voted, a bill of attainder?'

"Madison won his fight, not because he called the resolution a bill of attainder, but because it attainted too many men who were going to vote in the next election. The definition, however, was there—a bill of attainder—and the definition was given by the foremost American authority on the principles of liberty and order underlying our system of government."

the Senate Finance Committee and one of the authors of the Social Security system, said:

> "There has developed through the years a feeling both in and out of Congress that the contributory social insurance principle fits our times—that it serves a vital need that cannot be as well served otherwise. It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right, is far better than a gratuity. . . .
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> . . . . . .
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> "Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefits in dignity and self-respect." 102 Cong. Rec. 15110.

Social Security benefits have rightly come to be regarded as basic financial protection against the hazards of old age and disability. As stated in a recent House Report:

> "The old-age and survivors insurance system is the basic program which provides protection for America's families against the loss of earned income upon the retirement or death of the family provider. The program provides benefits related to earned income and such benefits are paid for by the contributions made with respect to persons working in covered occupations." H. R. Rep. No. 1189, 84th Cong., 1st Sess. 2.

Congress could provide that only people resident here could get Social Security benefits. Yet both the House and the Senate rejected any residence requirements. See H. R. Rep. No. 1698, 83d Cong., 2d Sess. 24-25; S. Rep.

No. 1987, 83d Cong., 2d Sess. 23. Congress concededly might amend the program to meet new conditions. But may it take away Social Security benefits from one person or from a group of persons for vindictive reasons? Could Congress on deporting an alien for having been a Communist confiscate his home, appropriate his savings accounts, and thus send him out of the country penniless? I think not. Any such Act would be a bill of attainder. The difference, as I see it, between that case and this is one merely of degree. Social Security benefits, made up in part of this alien's own earnings, are taken from him because he once was a Communist.

The view that § 202 (n), with which we now deal, imposes a penalty was taken by Secretary Folsom, appellant's predecessor, when opposing enlargement of the category of people to be denied benefits of Social Security, *e. g.*, those convicted of treason and sedition. He said:

> "Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs and to other crimes which, while perhaps different in degree, are difficult to distinguish in principle.
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> "The present law recognizes only three narrowly limited exceptions [1] to the basic principle that benefits are paid without regard to the attitudes, opinions, behavior, or personal characteristics of the indi-

[1] The three exceptions referred to were (1) § 202 (n); (2) Public Law 769, 68 Stat. 1142, 5 U. S. C. §§ 2281–2288; (3) Regulation of the Social Security Administration, 20 CFR § 403.409—denying dependents' benefits to a person found guilty of felonious homicide of the insured worker.

vidual . . . ." Hearings, Senate Finance Committee on Social Security Amendments of 1955, 84th Cong., 2d Sess. 1319.

The Committee Reports, though meagre, support Secretary Folsom in that characterization of § 202 (n). The House Report tersely stated that termination of the benefits would apply to those persons who were deported "because of illegal entry, conviction of a crime, or subversive activity." H. R. Rep. No. 1698, 83d Cong., 2d Sess. 25. The aim and purpose are clear—to take away from a person by legislative *fiat* property which he has accumulated because he has acted in a certain way or embraced a certain ideology. That is a modern version of the bill of attainder—as plain, as direct, as effective as those which religious passions once loosened in England and which later were employed against the Tories here.[4] I would affirm this judgment.

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[4] Brant, *op. cit., supra*, note 1, states at p. 9:

"What were the framers aiming at when they forbade bills of attainder? They were, of course, guarding against the religious passions that disgraced Christianity in Europe. But American bills of attainder, just before 1787, were typically used by Revolutionary assemblies to rid the states of British Loyalists. By a curious coincidence, it was usually the Tory with a good farm who was sent into exile, and all too often it was somebody who wanted that farm who induced the legislature to attaint him. Patriotism could serve as a cloak for greed as easily as religion did in that Irish Parliament of James the Second.

"But consider a case in which nothing could be said against the motive. During the Revolution, Governor Patrick Henry induced the Virginia legislature to pass a bill of attainder condemning Josiah Phillips to death. He was a traitor, a murderer, a pirate and an outlaw. When ratification of the new Constitution came before the Virginia Convention, Henry inveighed against it because it contained no Bill of Rights. Edmund Randolph taunted him with his sponsorship of the Phillips bill of attainder. Henry then made the blunder of defending it. The bill was warranted, he said, because Phillips was no Socrates. That shocking defense of arbitrary condemnation may have produced the small margin by which the Constitution was ratified."

SUPREME COURT OF THE UNITED STATES

No. 54.—October Term, 1959.

Flemming, Secretary of Health, Education and Welfare, Appellant, v. Ephram Nestor.	On Appeal From the United States District Court for the District of Columbia.

[June 20, 1960.]

Mr. Justice Brennan, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

When Nestor quit the Communist Party in 1939 his past membership was not a ground for his deportation. *Kessler* v. *Strecker*, 307 U. S. 22. It was not until a year later that past membership was made a specific ground for deportation.[1] This past membership has cost Nestor dear. It brought him expulsion from the country after 43 years' residence—most of his life. Now more is exacted from him, for after he had begun to receive benefits in 1955—having worked in covered employment the required time and reached age 65—and might anticipate

[1] The Alien Registration Act of 1940, 54 Stat. 673, made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation even though the membership was terminated prior to the passage of that statute. *See Harisiades* v. *Shaughnessy*, 342 U. S. 580. Until the passage of the Internal Security Act of 1950, 64 Stat. 1006, 1008, it was necessary for the Government to prove in each case in which it sought to deport an alien because of membership in the Communist Party that that organization in fact advocated the violent overthrow of the Government. The 1950 Act expressly made deportable aliens who at the time of entry, or at any time thereafter were "members of or affiliated with the Communist Party of the United States." *See Galvan* v. *Press*, 347 U. S. 522, 529.

receiving them the rest of his life, the benefits were stopped pursuant to § 202 (n) of the Amended Social Security Act.[2] His predicament is very real—an aging man deprived of the means with which to live after being separated from his family and exiled to live among strangers in a land he quit 47 years ago. The common sense of it is that he has been punished severely for his past conduct.

Even the 1950 statute deporting aliens for past membership raised serious questions in this Court whether the prohibition against *ex post facto* laws was violated. In *Galvan* v. *Press*, 347 U. S. 522, 531, we said "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation." However, precedents which treat deportation not as punishment, but as a permissible exercise of congressional power to enact the conditions under which aliens may come to and remain in this country, governed the decision in favor of the constitutionality of the statute.

However, the Court cannot rest a decision that § 202 (n) does not impose punishment on Congress' power to regulate immigration. It escapes the common-sense conclusion that Congress has imposed punishment by finding the requisite rational nexus to a granted power in the supposed furtherance of the Social Security program "enacted pursuant to Congress' power to 'spend money in aid of the general welfare.'" I do not understand the Court to deny that but for that connection, § 202 (n) would impose punishment and offend not only the constitutional prohibition on *ex post facto* laws but also violate the con-

[2] A comparable annuity was worth, at the time appellee's benefits were cancelled, approximately $6,000. To date he has lost nearly $2,500 in benefits.

stitutional guarantees against imposition of punishment without a judicial trial.

The Court's test of the constitutionality of § 202 (n) is whether the legislative concern underlying the statute was to regulate "the activity or status from which the individual is barred" or whether the statute "is evidently aimed at the person or class of persons disqualified." It rejects the inference that the statute is "aimed at the person or class of persons disqualified" by relying upon the presumption of constitutionality. This presumption might be a basis for sustaining the statute if in fact there were two opposing inferences which could reasonably be drawn from the legislation, one that it imposes punishment and the other that it is purposed to further the administration of the Social Security program. The Court, however, does not limit the presumption to that use. Rather the presumption becomes a complete substitute for any supportable finding of a rational connection of § 202 (n) with the Social Security program. For me it is not enough to state the test and hold that the presumption alone satisfies it. I find it necessary to examine the Act and its consequences to ascertain whether there is ground for the inference of a congressional concern with the administration of the Social Security program. Only after this inquiry would I consider the application of the presumption.

The Court seems to acknowledge that the statute bears harshly upon the individual disqualified, but states that this is permissible when a statute is enacted as a regulation of the activity. But surely the harshness of the consequences is itself a relevant consideration to the inquiry into the congressional purpose.[1] Cf. *Trop* v. *Dulles*, 356 U. S. 86, 110 (concurring opinion).

[1] The Court recognizing that *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, strongly favors the conclusion that § 202 (n) was enacted with punitive intent, rejects the force of those

It seems to me that the statute itself shows that the sole legislative concern was with "the person or class of persons disqualified." Congress did not disqualify for benefits all beneficiaries residing abroad or even all dependents residing abroad who are aliens. If that had been the case I might agree that Congress' concern would have been with "the activity or status" and not with the "person or class of persons disqualified." The scales would then be tipped toward the conclusion that Congress desired to limit benefit payments to beneficiaries residing in the United States so that the American economy would be aided by expenditure of benefits here. Indeed a proposal along those lines was submitted to Congress in 1954 at the same time § 202 (n) was proposed [4] and was rejected.[5]

Perhaps, the Court's conclusion that regulation of "the activity or status" was the congressional concern would be a fair appraisal of the statute if Congress had terminated the benefits of all alien beneficiaries who are deported. But that is not what Congress did. Section 202 (n) applies only to aliens deported on one or more of 14 of the 18 grounds for which aliens may be deported.[6]

H. R. Rep. No. 1698, 83d Cong., 2d Sess. 25, 77, cited by the Court, describes § 202 (n) as including persons who were deported "because of unlawful entry, conviction of a

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precedents as drawing "heavily on the Court's first-hand acquaintance with the events and the mood of the then recent Civil War, and 'the fierce passions which that struggle aroused.'" This seems to me to say that the provision of § 202 (n) which cuts off benefits from aliens deported for past Communist Party membership was not enacted in a similar atmosphere. Our judicial detachment from the realities of the national scene should not carry us so far. Our memory of the emotional climate stirred by the question of communism in the early 1950's cannot be so short.

[4] See H. R. Rep. No. 1698, 83d Cong., 2d Sess. 24-25.

[5] See S. Rep. No. 1987, 83d Cong., 2d Sess. 23; H. R. Rep. No. 2679, 83d Cong., 2d Sess. 4.

[6] See Court's opinion, *ante*, note 1.

crime, or subversive activity." The section, in addition, covers those deported for such socially condemned acts as narcotic addition or prostitution. The common element of the 14 grounds is that the alien has been guilty of some blameworthy conduct.[1] In other words Congress worked its will only on aliens deported for conduct displeasing to the lawmakers.

This is plainly demonstrated by the remaining four grounds of deportation, those which do not result in the cancellation of benefits. Two of those four grounds cover persons who become public charges within five years after entry for reasons which predated the entry. A third ground covers the alien who fails to maintain his nonimmigrant status. The fourth ground reaches the alien who, prior to or within five years after entry, aids other aliens to enter the country illegally.

Those who are deported for becoming public charges clearly have not, by modern standards, engaged in conduct worthy of censure. The Government's suggestion that the reason for their exclusion from § 202 (n) was an unarticulated feeling of Congress that it would be unfair to the "other country to deport such destitute persons without letting them retain their modicum of Social Security benefits" appears at the best fanciful, especially since, by hypothesis, they are deportable because the conditions which lead to their becoming public charges existed prior to entry.

The exclusion from the operation of § 202 (n) of aliens deported for failure to maintain nonimmigrant status rationally can be explained, in the context of the whole statute, only as evidencing that Congress considered that conduct less blameworthy. Certainly the Government's suggestion that Congress may have thought it unlikely that such persons would work sufficient time in covered

[1] See the Court's opinion, *ante*, note 13.

employment to become eligible for Social Security benefits cannot be the reason for this exclusion. For frequently the very act which eventually results in the deportation of persons on that ground is the securing of private employment. Finally, it is impossible to reconcile the continuation of benefits to aliens who are deported for aiding other aliens to enter the country illegally, except upon the ground that Congress felt that their conduct was less reprehensible. Again the Government's suggestion that the reason might be Congress' belief that these aliens would not have worked in covered employment must be rejected. Five years after entry would be ample time within which to secure employment and qualify. Moreover the same five-year limitation applies to several of the 14 grounds of deportation for which aliens are cut off from benefits and the Government's argument would apply equally to them if that in fact was the congressional reason.

This appraisal of the distinctions drawn by Congress between various kinds of conduct impels the conclusion, beyond peradventure that the distinctions can be understood only if the purpose of Congress was to strike at "the person or class of persons disqualified." The Court inveighs against invalidating a statute on "implication and vague conjecture." Rather I think the Court has strained to sustain the statute on "implication and vague conjecture," in holding that the congressional concern was "the activity or status from which the individual is barred." Today's decision sanctions the use of the spending power not to further the legitimate objectives of the Social Security program but to inflict hurt upon those who by their conduct have incurred the displeasure of Congress. The Framers ordained that even the worst of men should not be punished for their past acts or for

any conduct without adherence to the procedural safeguards written into the Constitution. Today's decision is to me a regretful retreat from *Lovett*, *Cummings* and *Garland*.

Section 202 (n) imposes punishment in violation of the prohibition against *ex post facto* laws and without a judicial trial.[8] I therefore dissent.

[8] It is unnecessary for me to reach the question whether the statute also constitutes a bill of attainder.